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No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

IN THE MATTER OF THE ARBITRATION BETWEEN MARITIME INTERNATIONAL NOMINEES ESTABLISHMENT,

Petitioner,

v.

THE REPUBLIC OF GUINEA,

Respondent,

THE UNITED STATES OF AMERICA,

Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether a foreign state is collaterally estopped from challenging the jurisdiction of a district court to enforce an arbitral award, where the foreign state had notice and opportunity to litigate the identical jurisdictional issue in an earlier proceeding between the same parties in which the district court entered an order compelling arbitration.

2. Whether a foreign state which agrees to arbitrate disputes with a private party in the United States, before a panel of arbitrators to be selected by an international organization, can be compelled by a district court to arbitrate before a substitute panel of arbitrators designated by the American Arbitration Association, where the arbitration as originally stipulated cannot be carried out.

The following listed parties appeared below:

The Republic of Guinea, appellant;

Maritime International Nominees Establishment (MINE), appellee;

The United States of America, intervenor.

MINE, a Lichtenstein corporation, is (or was) affiliated with the Inter Maritime Bank of Geneva, Switzerland; M.I.N.E., Inc. (Panama); M.I.N.E. (Liberia); Inter Maritime Management S.A. of Geneva, Switzerland; Global Bulk Transport, Inc., a New York corporation ("Global"); and affiliates of Global: States Marine International, a Delaware corporation; Isthmian Lines, Inc.; and Trans World Carriers, Inc.

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Petitioner, Maritime International Nominees Establishment, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which reversed, for lack of subject matter jurisdiction, a judgment of the United States District Court of the District of Columbia confirming an arbitral award against the Respondent.

OPINIONS BELOW

The memorandum opinion of the District Court is reported at 505 F. Supp. 141, and is set forth in Appendix

A, *infra,* 1a-6a. The opinion of the Court of Appeals of November 12, 1982, is reported at 693 F.2d 1094, and is set forth in Appendix B, *infra,* 7a-43a; an amendment to that opinion of January 27, 1983, is not reported, and is set forth in Appendix C, *infra,* 44a-49a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 12, 1982. A timely petition for rehearing was denied on January 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND TREATY INVOLVED

1. The Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq.,* provides in relevant part as follows:

> § 1330. Actions against foreign states
>
> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.
>
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States; . . .

2. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington March 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090 ("ICSID Convention"), provides in Article 25(1) as follows:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have

given their consent, no party may withdraw its consent unilaterally.

STATEMENT OF THE CASE

In 1971, petitioner, Maritime International Nominees Establishment ("MINE"), a Lichtenstein corporation, and the Republic of Guinea ("Guinea") contracted to establish SOTRAMAR, a "mixed economy company" under the laws of Guinea, which was to ship bauxite mined in Guinea to Europe and the United States ("SOTRAMAR Agreement;" J.A. 205-27)[1]. Chapter XVIII of the Agreement prescribed binding arbitration to resolve disputes which could not be resolved through conciliation (J.A. 226). The arbitral panel was to be selected as follows:

> There shall be 3 (three) arbitrators. These will be selected by the President of CIRDI [2] at the joint request of the parties or failing this, at the request of the most diligent party. (J.A. 226).

The SOTRAMAR Agreement was subsequently supplemented to designate the "President of the International Court of Settlement of International [sic] Disputes in Washington (CIRDI)" as the person who would select the three arbitrators (J.A. 229).

Guinea breached the SOTRAMAR Agreement (J.A. 343), and after efforts at informal conciliation failed, MINE sought to arbitrate the dispute. Since officials of the International Centre for the settlement of Investment

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[1]The reference "J.A." is to the Joint Appendix in the Court of Appeals, a copy of which has been lodged with the Clerk of this Court.

[2]"CIRDI" is the French acronym for the International Centre for Settlement of Investment Disputes in Washington, D.C.

Disputes ("ICSID") do not designate commercial arbitrators pursuant to the language of the SOTRAMAR Agreement (J.A. 293-94), MINE and Guinea executed a consent instrument to be submitted to ICSID to obtain an appointment of arbitrators (J.A. 45).[3] After execution of the consent instrument, MINE concluded that its Lichtenstein nationality made it ineligible to use ICSID's dispute resolving machinery since Lichtenstein is not a party to the ICSID Convention. In an attempt to overcome this jurisdictional deficiency, and because MINE's affiliate, MINE Inc., had been substituted as the private party to the agreement (J.A. 232), MINE requested Guinea to execute a revised consent instrument (J.A. 46). Guinea, however, did not execute the revised consent and broke off all further communications with MINE.

In January, 1978, frustrated in its efforts to have ICSID appoint arbitrators or to obtain Guinea's cooperation for a valid submission to ICSID, MINE commenced an action[4] in the district court under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* to enforce the parties' undertaking to arbitrate their disputes (J.A. 6-10). MINE petitioned the district court to compel arbitration and to name substitute arbitrators under Sections 4 and 5 of the Federal Arbitration Act, 9 U.S.C. §§ 4, 5. Subject matter jurisdiction and personal jurisdiction over Guinea was in-

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[3] *See also* n. 11, *infra.*

[4] Prior to the institution of the action, MINE's new counsel addressed a letter to the Guinean Ambassador to the United States asking again whether Guinea would consent to arbitration. (Exhibit F to MINE's Petition to Compel Arbitration; *reproduced in* the Addendum 4 to MINE's Brief in the Court of Appeals, D.C. Cir. No. 91-1073). The Ambassador had on previous occasions engaged in several business-oriented contacts with MINE related to the SOTRAMAR agreement (App. A, 6a). No response was received to that request.

voked under the Foreign Soverign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1604(a)(1) and (a)(3). Service on Guinea was effected under Section 1608(a) of the FSIA (J.A. 47). Guinea did not appear.

After a hearing, the district court issued an order compelling arbitration of the dispute before a panel to be selected by the American Arbitration Association (J.A. 48-49). In entering the order, the district court found "that the making of the agreement for said arbitration is not an issue," and that "there has been a lapse in the appointment of arbitrators and frustration of the intent to arbitrate as provided in the said agreement because the respondent has failed to avail itself of the method of naming arbitrators provided for in the said agreement." (*Id*). A copy of the district court's order was served on Guinea in accordance with Section 1608(a) of the FSIA and governing Department of State regulations. (J.A. 50). Guinea made no attempt either to set aside or to appeal the district court's order.

In the ensuing two-year period, extensive arbitration proceedings were held in Washington, D.C., before a panel designated by the American Arbitration Association. Through notices sent to the Guinean Ministry of Foreign Affairs, and its Embassy in Washington, Guinea was kept abreast of the status of the proceedings and was repeatedly asked to appear and respond (J.A. 92-101). Guinea, however, chose not to appear, participate, or communicate with the arbitral panel. In June, 1980, the arbitral panel rendered an award in favor of MINE (J.A. 89-90), which was again duly served upon Guinea (J.A. 101, 121-22).

In August, 1980, MINE filed a motion in the district court under Section 9 of the FAA, 9 U.S.C. § 9, for an

order confirming the arbitral award and for entry of judgment. A copy of the motion to confirm was served on Guinea in the same manner as all previous notices (J.A. 69-71). This time, Guinea appeared and challenged both the district court's jurisdiction to confirm the award, as well as its jurisdiction to compel the arbitration which resulted in the award that MINE now sought to confirm (J.A. 125-141).

Following extensive briefing and oral argument, the district court found that it had subject matter jurisdiction and *in personam* jurisdiction to compel arbitration and to confirm the ensuing arbitral award, and issued an order confirming MINE's award (J.A. 297). In its accompanying memorandum opinion, the court found that Guinea had implicitly waived its sovereign immunity from suit by agreeing to arbitration that could be expected to be held in the United States. This waiver gave the district court the requisite subject matter jurisdiction under Section 1605(a)(1) of the FSIA (App. A, 5a). The court also found jurisdiction under Section 1605(a)(2) of the FSIA, based upon Guinea's extensive activities in the United States in connection with this commercial contract (App. A, 6a). Based on these jurisdictional findings, the court concluded that "it is clear that the Order compelling arbitration was proper, . . . and that this Court has authority to confirm the award."[5]

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[5]After entry of judgment, Guinea moved in the district court for a new trial or for relief from judgment on the ground that "newly discovered evidence" showed that MINE's service of process had been defective under the FSIA. (J.A. 305). Coupled with the motion was an application for a stay of the judgment until the district court had ruled on the motion for a new trial. The district court denied both motions, but allowed Guinea five days to seek a stay from the Court of Appeals pending appeal. (J.A. 325). Such a stay was granted by the Court of Appeals. (App. B, 15a).

The Court of Appeals reversed.[6] Although Guinea raised numerous issues,[7] the Court disposed of the Appeal on

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[6]The United States was granted leave to intervene in the appeal to submit argument in support of the constitutionality of the FSIA, which Guinea had challenged. Adopting the rationale of the Second Circuit in *Verlinden, B.V. v. Central Bank of Nigeria,* 647 F.2d 320 (1981), Guinea argued that Congress could not, consistent with Article III of the Constitution, confer jurisdiction on federal courts to hear suits by foreign corporations against foreign states. In view of the disposition of the appeal on jurisdictional grounds, the Court of Appeals did not reach the constitutional issue.

The United States also filed a "suggestion of interest," setting forth the background and the Executive Branch's general position with respect to the ICSID Convention. The United States suggested that if a foreign state consents to ICSID jurisdiction only, such consent should not be regarded as a waiver of sovereign immunity from suit in the courts of the United States, other than for purposes of enforcing an ICSID award under 22 U.S.C. § 1650a; the United States further urged that where it is unclear whether ICSID has jurisdiction, the case should be stayed and the matter referred to ICSID for a jurisdictional ruling. Brief of the United States of America as Intervenor and Suggestion of Interest, D.C. Cir. No. 81-1073.

[7]The Court of Appeals summarized the issues raised by Guinea as follows (App. B, 15a-16a):

> First, [Guinea] claims that the District Court lacked subject matter jurisdiction because: (1) the court erred in ruling that Guinea was not immune under the FSIA; (2) even assuming non-immunity, the FSIA does not purport to confer subject matter jurisdiction over suits between foreign plaintiffs and foreign states; (3) the FSIA would be unconstitutional if read to confer such jurisdiction; and (4) the signing by both parties of the first ICSID consent form committed them to an ICSID arbitration and therefore deprived the District Court of jurisdiction.
>
> Second, Guinea claims that MINE's service of process upon it was inadequate under the FSIA, and therefore that the District Court lacked personal jurisdiction under the FSIA. Third, Guinea attacks the arbitration award itself, contending (1) that the arbitrators exceeded their authority by disregarding the liquidated damages provision of the contract, (2) that the arbitrators lacked power to delegate

the basis of a single issue, *viz.*, that the district court lacked subject matter jurisdiction to confirm the arbitration award because Guinea had not waived its sovereign immunity. (App. B, 8a).

The Court of Appeals rejected Guinea's belated jurisdictional challenge to the district court's earlier order to compel arbitration. The Court ruled that the proceeding to compel arbitration was an independent action under the FAA and the ensuing order to compel was a final and appealable order. Since Guinea had failed to appeal that order within the statutory period, the order became *res judicata* between the parties and "Guinea cannot now, by way of appealing the confirmation order, obtain review of the earlier order to compel." (App. B, 15a n.8).

But despite the fact that Guinea's grounds for challenging the jurisdiction of the court to confirm the award were identical to those asserted in support of the challenge to the district court's power to compel arbitration, the Court of Appeals held that Guinea's non-appearance in the earlier proceedings did not preclude it from challenging the district court's authority in the later confirmation proceedings. The Court brushed aside the doctrine of collateral estoppel with the observation that "that doctrine requires that . . . issues . . . [of] jurisdiction be fully litigated before they are preclusively established" (App. B, 16a n.9).

The Court of Appeals based its decision that Guinea had not waived its sovereign immunity from suit in the

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the task of damage calculation to an accounting firm, (3) that the award was based on evidence outside the record, and (4) that MINE obtained an AAA arbitration by misrepresenting before the District Court the availability of an ICSID arbitration.

courts of the United States on the finding that Guinea only agreed to arbitrate before ICSID, and that an agreement to arbitrate before ICSID does not constitute a waiver of sovereign immunity within the purview of the FSIA (App. B, 18a-25a). In its original opinion, the Court rejected MINE's argument that the parties had not intended to submit the entire dispute to ICSID, but had intended commercial arbitration in the United States before arbitrators selected by the "President" of ICSID. The Court ruled that because MINE had not made the argument in the district court, it was precluded from arguing on appeal that the SOTRAMAR Agreement committed Guinea to any arbitration other than arbitration under the ICSID Convention.

The Court also reversed the districts court's finding that Guinea's commercial activities in the United States in connection with the SOTRAMAR agreement established subject matter jurisdiction under Section 1605(a)(2) (App. B, 27a).

MINE sought rehearing on the ground that the Court of Appeals was demonstrably incorrect when it assumed that MINE had failed to argue below that the arbitration clause in the SOTRAMAR Agreement stipulated non-ICSID, commercial arbitration (App. B, 20a). MINE further urged that this Court's recent decision in *Insurance Corp. v. Compagnie des Bauxites,* ____ U.S. ____, 72 L. Ed. 2d 492 (1982), required the application of the principle of collateral estoppel to Guinea's belated attack on the district court's subject matter jurisdiction.

The Court of Appeals denied the rehearing petition, but made extensive revisions in its earlier opinion (App. C, 44a-49a). The Court now held that, based upon its own examination of the circumstances surrounding the execution

and implementation of the SOTRAMAR Agreement, the district court's waiver holding "was unquestionably" based on the factual conclusion that the parties had contemplated an ICSID arbitration, and it declined to disturb that finding (App. C, 45a). As to collateral estoppel, the Court distinguished the *Compagnie des Bauxites* case on the grounds that Guinea's immunity defense was based on lack of personal, as well as subject matter, jurisdiction; therefore, Guinea was not foreclosed from challenging the district court's jurisdiction in a collateral proceeding (App C, 49a).

REASONS FOR GRANTING THE PETITION

If left standing, the Court of Appeals' decision will seriously compromise the principle of finality which underlies the doctrine of collateral estoppel, which, in turn, will limit the utility of arbitration as an alternative to litigating commercial disputes with foreign states.

1. In an unbroken line of decisions, reaffirmed only last Term in *Insurance Corp. v. Compagnie des Bauxites, supra,* this Court established the rule that a party which has challenged the subject matter jurisdiction of a federal court, or has had the opportunity to challenge subject matter jurisdiction, is estopped from relitigating subject matter jurisdiction in another proceeding between the same parties in the same or in a different forum. *Chicot County Drainage District v. Bank,* 308 U.S. 371 (1940); *Stoll v. Gottlieb,* 305 U.S. 165 (1938); *United States v. Moser,* 266 U.S. 236 (1926). This principle applies to governmental parties as well as private parties. *Montana v. United States,* 440 U.S. 147 (1979).

The *Chicot County* case is especially apposite here. There, the Court applied the rule of collateral estoppel under circumstances where the district court had based its

jurisdiction in the prior proceedings upon a statute that had been declared unconstitutional by this Court in another suit between different parties. The jurisdiction of the district court in the later proceedings was based on the same invalid statute. Furthermore, the party challenging subject matter jurisdiction had not appeared in the original proceedings, though it had the opportunity to do so, and the issue of subject matter jurisdiction had not been raised in those proceedings.

The foregoing precedents clearly control this case. The Court of Appeals' ruling that the order to compel arbitration before a panel selected by the American Arbitration Association was *res judicata* between the parties necessarily implied that the district court had the requisite subject matter and personal jurisdiction to issue that order. Since the district court's subject matter jurisdiction to confirm the award rested on exactly the same legal predicate as its subject matter jurisdiction to compel arbitration, Guinea should have been collaterally estopped from challenging the court's subject matter jurisdiction to confirm the award.

A more compelling case for the application of the doctrine of collateral estoppel than the present can hardly be hypothesized. In both the 1978 action to compel arbitration and in the 1980 action to confirm the arbitral award, the parties were the same, the court was the same, the contract in dispute was identical, and the jurisdictional predicates for the two proceedings were identical. Guinea had repeated actual notice of the proceedings and full opportunity to challenge the district court's jurisdiction to issue the order compelling arbitration; to move to set aside the order, once it was issued; and to seek direct review of the district court's order. In addition, Guinea received no less than thirty-two notices in the follow-on arbitration proceedings (J.A. 92-101).

Guinea elected not to appear in the district court, and it likewise assumed a "wait-and-see" attitude in the arbitration proceedings. But Guinea's abstention carried a risk which the law imposes on all litigants – governmental and private – under such circumstances, namely, that the trial court would determine its jurisdiction on its own, *Stoll v. Gottlieb, supra,* 305 U.S. at 171, and that such determination would become final and binding on Guinea in a subsequent proceeding regarding the same dispute even if the determination was reached upon an erroneous assessment of the facts or by an erroneous application of the law. *United States v. Moser, supra,* 266 U.S. at 242.

The Court of Appeals' attempt, in its revised opinion, to distinguish *Insurance Corp. v. Compagnie des Bauxites, supra,* on the basis of a passing remark in that opinion that a defendant is always free to ignore the judicial proceeding and challenge an ensuing judgment collaterally (72 L. Ed. 2d at 504), is ill-conceived. The Court's remark addressed solely the issue of collateral attack on *in personum* jurisdiction, not subject matter jurisdiction, which was the sole basis for the Court of Appeals' reversal of the order to confirm the award. Other portions of the *Compagnie des Bauxites* opinion leave no doubt that subject matter jurisdiction may not be collaterally attacked so long as the party has had the *opportunity* to litigate that issue – regardless of whether it availed itself of that opportunity. As this Court stated:

> A party that has had the opportunity to litigate the question of subject matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of *res judicata* apply to jurisdictional determinations – both subject matter and personal. [Citations omitted; 72 L. Ed. 2d at 501 n. 9].

The Court of Appeals' erroneous ruling on the lack of preclusive effect of the district court's earlier order will also seriously undermine the utility of arbitration as an alternative to litigation of commercial disputes with foreign states. Where, as here, the availability *vel non* of commercial arbitration is belatedly disputed by one party to an arbitration agreement, rudimentary fairness and orderly administration of justice demand that the party resisting arbitration raise its challenge at the earliest opportunity, before the other party embarks upon protracted and expensive arbitration.[8] For the arbitral process to work, the party enlisting the aid of the courts must have some assurance that issues such as the arbitrability of the dispute and the subject matter jurisdiction of the court to compel arbitration are not raised for the first time years later when, as here, proceedings to confirm the award become necessary. But this is exactly what the Court of Appeals has permitted Guinea to do when it disregarded the principle — so consistently reiterated by this Court — that subject matter jurisdiction may not be collaterally attacked where a party has had the opportunity to litigate that issue.

A strict application of the doctrine of collateral estoppel is thus of signal importance to the policy of favoring the

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[8] *See Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F. Supp. 1, 12 (S.D.N.Y. 1973), *aff'd*, 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974) ("[D]efendant was fully advised as to the employment of the arbitrator but remained silent and made no objection to his acting."); *T & R Enterprises v. Continental Grain Co.*, 613 F.2d 1272 (5th Cir. 1980) *Cook Industries, Inc. v. Itoh & Co. (America)*, 449 F.2d 106, 107-108 (2d Cir. 1971), *cert. denied*, 405 U.S. 921 (1972). ("[A party] cannot remain silent, raising no objection during the course of the arbitration proceeding, and when an adverse award to him has been handed down complain of a situation of which he had knowledge from the first.")

settlement of international and domestic disputes by arbitration.

2. The Court of Appeals' ruling undermines the prime objective of the FSIA by frustrating a foreign investor's clear intent to have its disputes with a foreign state resolved by an effective form of arbitration. Subsection (a)(1) of Section 1605 of the FSIA provides that foreign states are not immune from the jurisdiction of the courts of the United States in any case "[i]n which the foreign state has waived immunity either explicitly or by implication." The legislative history of that provision expressly mentions as examples of implicit waivers "cases where a foreign state has agreed to arbitration in another country . . . ." H. Rep. No. 94-1487, 94th Cong., 2d Sess., 18.[9] The Court of Appeals held that the arbitration clause in the SOTRAMAR Agreement was not an agreement "to arbitration in another country" (App. B, 24a) and, therefore, did not constitute a waiver of sovereign immunity within the purview of Section 1605(a)(1) of the FSIA. This holding ignores the manifest intent of the par-

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[9]Lower federal courts have placed varying and inconsistent interpretations on Section 1605(a)(1)'s waiver provision. *Compare, Verlinden B.V. v. Central bank of Nigeria,* 488 F. Supp. 1284 (S.D.N.Y. 1980) *aff'd on other grounds,* 647 F.2d 320 (2d Cir. 1981), *cert. granted,* ____U.S.____, 71 L. Ed. 2d 291 (1982) (agreement by Nigeria to arbitrate in France under Swiss law does not waive immunity in U.S. courts); *with Ipitrade Int'l, S.A. v. Federal Republic of Nigeria,* 465 F. Supp. 824 (D.D.C. 1978) (agreement by Nigeria to arbitrate in France under Swiss law waives immunity in U.S. courts); *Libyan American Oil Co. v. Libya,* 482 F. Supp. 1175 (D.D.C. 1980), *vacated by stipulation,* No. 80-1207 (D.C. Cir. May 6, 1981) (agreement by Libya to arbitrate under Libyan and international law, location not specified, but eventually arbitrated in Switzerland, waives immunity in U.S. courts); *and, Birch Shipping Corp. v. Embassy of Tanzania* 507 F. Supp. 311 (D.D.C. 1981) (agreement by Tanzania to arbitrate, location not specified, but eventually arbitrated in New York, waives immunity in U.S. courts).

ties to have their disputes resolved by commercial arbitration.[10]

But even if the parties intended ICSID arbitration only, they must have intended an ICSID arbitration that could be realized, that is, arbitration proceedings consistent with the ICSID Convention and the rules of practice of ICSID.[11]

Under Article 25(1) of the ICSID Convention, *supra,* the jurisdiction of ICSID is limited to disputes in which both the respondent state and the state of which the private party is a national have ratified the ICSID Convention.[12] MINE is a Lichtenstein corporation and Lichtenstein has not ratified the Convention. Under the express

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[10]Guinea entered into the SOTRAMAR Agreement pursuant to the Guinean law on "mixed economy companies," which provides that the "State in a mixed economy company is a shareholder, like any other, and its rights and obligations are those derived from its statute [*sic*] as the shareholder, rather than as the State." (Law No. 66/AN/62, *Journal Officiel de la Republique de Guinee,* October 1, 1962; J.A. 300 n.1).

The Court of Appeals rejected MINE's argument that by becoming a participant in a commercial enterprise, and by agreeing to arbitrate disputes involving that interprise, Guinea expressly waived its sovereign immunity (App. B, 2).

[11]The ICSID Convention contemplates arbitration in accordance with a procedural scheme set out in separate rules. *See ICSID Regulations and Rules,* Doc. ICSID/4/Rev. 1 (1975). But ICSID itself does not arbitrate disputes; rather, it arranges for arbitrations by maintaining a list of arbitrators designated by Contracting States and by the President of the World Bank. (ICSID Convention, Arts. 12-16). The parties to a dispute are not limited in selecting arbitrators to the ICSID list (*id.,* Art. 40), and they are free to stipulate alternative procedures for the conduct of the arbitration (*id.,* Art. 44). There are no provisions for the mere appointment of commercial arbitrators.

[12]In addition to meeting the Convention's nationality requirement, consent of the parties is an essential prerequisite for the jurisdiction of ICSID. Jurisdiction is further limited by reference to the nature of the dispute.

language of the Convention and established principles of international law,[13] MINE could not use the Convention machinery for the arbitration of disputes.

The ICSID Convention is part of the law of the land, and its interpretation is uniquely a function of the judiciary. Whether the parties' endeavor to bring the dispute before ICSID was legally realizable could have been ascertained with facility by the Court of Appeals.

If the dispute was ineligible for arbitration under the auspices of ICSID, it is implausible to assume, as the Court of Appeals did, that the parties intended arbitration which could not be carried into effect. Since the arbitration clause in the Agreement makes arbitration the sole method for the resolution of all disputes and claims between the parties, MINE would be deprived of all redress for Guinea's breach of the SOTRAMAR Agreement. The Court of Appeals' ruling, thus, leads to the absurd result that a sophisticated foreign investor who puts large sums of money at risk in a developing country on condition that there will be arbitration, and secures the express written agreement of the foreign sovereign-partner to arbitration, is denied all remedy. To foreclose the possibility of this patently unfair and illogical result, the Court of Appeals should have examined whether the ICSID Convention

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[13] *Barcelona Traction Light and Power Co.*, [1970] I.C.J. 3. *See also,* Tedeschi, *The Determination of Corporate Nationality,* 50 Australian L.J. 521 (1976).

An earlier draft of the ICSID Convention proposed a broader definition of nationality including a piercing of the corporate veil. *Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Documents Concerning the Origin and Formulation of the Convention,* Vol. II, Pt. I, 230 (1968). The proposal was strongly opposed, and ultimately dropped from the final draft. *Id.* at 359-61, 445-51, 537-40.

could accommodate an arbitration of the dispute between the parties under the auspices of ICSID.

If, on the other hand, the Court of Appeals was not prepared to explore the jurisdictional ramifications of the ICSID Convention on its own, the Court should have adopted the suggestion of the United States, stayed the proceedings, and instructed the district court to obtain an authoritative ruling from ICSID as to whether the dispute was capable of arbitration under the ICSID Convention and the Rules of ICSID.[14]

The Court of Appeals' facile conclusion that Guinea's consent to ICSID arbitration conclusively establishes ICSID's exclusive jurisdiction, and did "not foresee . . . a role for United States courts" (App. B, 25a), without regard to the effectiveness of the consent, constitutes an erroneous interpretation of a key component of an im-

[14]The United States submitted in its suggestion of interest (*supra*, n.6, pp. 48-49) in relevant part as follows:

> To prevent United States courts from improperly asserting jurisdiction over ICSID cases, and to accord the necessary deference to ICSID's jurisdictional autonomy, the United States submits that a rule of abstention should be followed in U.S. courts. *Cf., Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Where cases brought initially in the courts arguably come within ICSID's exclusive jurisdiction, the proceedings must be stayed to permit the party alleging ICSID's unavailability to obtain a definitive ruling from ICSID. Once ICSID makes its determination, either the case would remain within the Centre's exclusive jurisdiction, or, if ICSID finds that it lacks jurisdiction, the court would be free to address the case itself, assuming it has an independent basis for exercising jurisdiction over the parties.
>
> This proposed rule is similar to the procedure recently urged by the United States to accommodate similar principles of exclusivity and autonomy over jurisdiction by the Iran-U.S. Claims Tribunal.

portant treaty of the United States, without any analysis of the treaty and its negotiating history. Moreover, it leads to the untenable result that United States courts are unavailable to enforce the express agreement of the parties here to arbitrate their disputes, "even though the agreed-to arbitration would probably take place on United States soil." (App. B, 25a).

In the context of this case, such a holding undermines the strong national policy of this country favoring the arbitrability of transnational commercial disputes, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), and the enforcement of arbitral awards settling such disputes.[15]

The petition, we submit, presents important and recurring questions of interpretation of the Foreign Sovereign Immunities Act of 1976 and of the ICSID Convention that have not been, but should be, addressed by this Court.

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[15] *See* the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, and its implementing legislation, 9 U.S.C. §§ 201 *et seq.* *See also* the act rendering enforceable arbitration awards rendered under the ICSID Convention, 22 U.S.C. § 1650a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APRIL, 1983.

APPENDIX

APPENDIX A

In the Matter of the Arbitration between
MARITIME INTERNATIONAL NOMINEES ESTABLISHMENT, Petitioner,

v.

The REPUBLIC OF GUINEA,
Respondent.

Civ. A. No. 78-388.

United States District Court,
District of Columbia.

Jan. 12, 1981.

MEMORANDUM

GESELL, District Judge.

Petitioner in this case is seeking an order confirming an arbitration award in excess of $25,000,000 made following this Court's Order of June 15, 1978, directing the parties to arbitrate. The Republic of Guinea, after ignoring the earlier proceedings and failing to participate in the arbitration, now comes forward at the eleventh hour contending that this Court is without jurisdiction. Although numerous issues have been advanced by the parties, it now is agreed that the central issue is whether the Foreign Sovereign Immunities Act ("FSIA") of 1976 (principally codified at 28 U.S.C. §§ 1330, 1602-1611 (1976)) granted this Court jurisdiction to order Guinea to arbitrate. The Court finds that it had jurisdiction under the FSIA and an

Order now confirming the award accompanies this Memorandum.

A brief description of the history of this litigation will help clarify the legal issues involved. In 1971, petitioner, a Liechtenstein corporation, and the Republic of Guinea signed an agreement forming a company known as Societe d'Economie Mixte de Transports Maritimes (SOTRAMAR) to engage in the shipment of bauxite mined in Guinea. SOTRAMAR was formed as a mixed-economy company under the laws of Guinea,[1] and, according to the contract, "shall have a civil personality and financial autonomy." Disputes under the contract forming SOTRAMAR were to have been resolved by binding arbitration conducted by three arbitrators selected by the President of the International Centre for Settlement of Investment Disputes ("ICSID"), a group affiliated with the World Bank.

A dispute ultimately arose between petitioner and the Republic of Guinea, and petitioner attempted to get approval from Guinea for the matter to be heard in arbitration as contemplated by the contract. Guinea refused to give its consent, and petitioner came before this Court in 1978 seeking an order to compel arbitration pursuant to the United States Arbitration Act, 9 U.S.C. § 1 *et seq.*

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[1] Article 91 of the Guinean law regarding corporate entities, adopted September 1, 1962, provides that:

> The State in a mixed economy company is a shareholder, like any other, and its rights and obligations are those derived from its statute as the shareholder, rather than as the State.

Petitioner's Reply Brief, at 1.

(1976).[2] Despite more than adequate notice, Guinea never appeared in the proceedings before this Court. A hearing was held and an arbitration was ordered before the American Arbitration Association.

Over a two-year period, extensive arbitration proceedings were held. Guinea repeatedly was made aware of what was occurring and periodically was offered an opportunity to appear and respond. Guinea never answered in any fashion. In June, 1980, the arbitration was concluded and an award was made in favor of petitioner. The petitioner then filed a motion with this Court to confirm the award and enter judgment. Shortly before a hearing on the motion was scheduled in this Court, Guinea obtained counsel and that counsel sought a delay in order to respond. A short delay was granted, and it was then that Guinea first advanced its argument that this Court was without jurisdiction.[3]

Jurisdiction under the FSIA has been discussed by several other courts faced with situations somewhat similar to the one now posed. *See, e.g., Verlinden B. V. v. Central Bank of Nigeria,* 488 F.Supp. 1284 (S.D.N.Y. 1980); *Lybian American Oil Co. v. Socialist People's Li-*

[2]The parties dispute whether petitioner could have proceeded to arbitration in the manner contemplated by the contract despite Guinea's refusal to participate. The Court finds, on the basis of the affidavits and evidence presented, that petitioner could not have proceeded under the contract. The Arbitration Act was the only mechanism available to the Court in view of its inability to order the President of ICSID to appoint arbitrators.

[3]At hearing, counsel for Guinea was asked whether there was any explanation for Guinea's repeated failure – despite notice – to respond either in this Court or before the American Arbitration Association. Counsel stated he was unable to present any explanation.

byan Arab Jamahirya, 482 F.Supp. 1175 (D.D.C. 1980); *Ipitrade International, S.A. v. Federal Republic of Nigeria,* 465 F.Supp. 824 (D.D.C. 1978). The discussion here, therefore, will not be extensive. The key question is whether Guinea lost its immunity either because it has waived that immunity, *see* 28 U.S.C. § 1605(a)(1) (1976), or because of its commercial activities in the United States, *see* 28 U.S.C. § 1605(a)(2) (1976). The Court finds that under both criteria Guinea lost its immunity and the Court accordingly had jurisdiction.

Waiver

Under 28 U.S.C. § 1605(a)(1) (1976), a foreign state loses its immunity in any case "in which the foreign state has waived its immunity either explicitly or by implication." The House Report accompanying the FSIA, moreover, states that:

> With respect to implicit waivers, the courts have found such waivers in cases where the foreign state has agreed to arbitration in another country or where the foreign state has agreed that the law of a particular country should govern a contract.

H.R.Rep.No. 94-1487, 94th Cong., 2nd Sess. 18, *reprinted in* [1976] U.S. Code Cong. & Admin. News, pp. 6604, 6617. Although courts have differed on the extent to which the House Report language should be read as controlling the reach of the waiver provision, *compare Verlinden B. V. v. Central Bank of Nigeria, supra,* 488 F.Supp. at 1300-02, *with Ipitrade International, S.A. v. Federal Republic of Nigeria, supra,* 465 F.Supp. at 826, it is clear that on the facts of *this* case, there has been an implicit waiver of immunity by Guinea sufficient to give this Court jurisdiction.

No express provision in the SOTRAMAR contract sets

forth a place for arbitration,[4] but by agreeing to arbitration before arbitrators selected by the president of ICSID, Guinea implicitly agreed to arbitration in the United States. ICSID is located in Washington, D.C., and under Rule 13 of ICSID's "Rules of Procedure for Arbitration Proceedings," sessions of its tribunals "shall meet at the seat of the Centre" unless another site is agreed upon by the parties and approved by ICSID itself. The only fair construction of the SOTRAMAR contract and the ICSID rules is that the parties contemplated arbitration to be held in the United States.[5] This gives the SOTRAMAR contract an even greater nexus with the United States than the contracts in other cases where waiver has been found. *See, e. g., Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya, supra; Ipitrade International, S.A. v. Federal Republic of Nigeria, supra; cf. Verlinen B.V. v. Central Bank of Nigeria, supra.* Counsel for Guinea has argued that a waiver should be found only where there is *both* an agreement to arbitrate in another country and an agreement to be bound by the laws of another country. But that is too constricted a view. The Court finds that by agreeing to arbitration that could be expected to be held in the United States, Guinea waived its immunity before this Court within the meaning of 28 U.S.C. § 1605(a)(1) (1976).

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[4]The contract does provide, however, a "law of a particular country" to govern the contract, and that is the law of Guinea.

[5]The omission of a site for the arbitration cannot be viewed as a mere oversight by the parties. In the agreement between the Republic of Guinea and the Harvey Aluminum Company of Delaware concerning mining of the bauxite that would be carried by SOTRAMAR, the contract expressly states that "[a]rbitration shall take place in Geneva."

Commercial Activities

Under 28 U.S.C. § 1605(a)(2) (1976), a foreign state also loses its sovereign immunity when it engages in commercial activities within the United States or in commercial activities outside the United States that have a "direct effect" within this country. The Court finds that Guinea engaged in activities that meet this standard.

Numerous meetings were held, including meetings in Connecticut and in the District of Columbia, relating to the contract. Guinea directed an American shipping group to perform substantial activities to aid SOTRAMAR. The Guinean ambassador to the United States engaged in several business-oriented contacts with officials of petitioner related to the project. The sum of these activities is more than sufficient to constitute commercial activity within the meaning of section 1605(a)(2), and to give the district courts jurisdiction over Guinea. Venue is proper in this Court under the express authority granted to the District Court for the District of Columbia by 28 U.S.C. § 1391(f)(4) (1976).

Having established that this Court has jurisdiction over Guinea, it is clear that the Order compelling arbitration was proper, *see* 9 U.S.C. § 9 (1976), and that this Court has authority to confirm the award, *see* 9 U.S.C. § 9 (1976); *cf. Marine Transit Corp. v. Dreyfus,* 284 U.S. 263, 275-76, 52 S.Ct. 166, 169, 76 L.Ed. 282 (1932). The Court is satisfied that the arbitration proceedings were conducted in a regular and proper manner and the award for damages and costs is confirmed in all respects.

APPENDIX B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1073

IN THE MATTER OF THE ARBITRATION BETWEEN
MARITIME INTERNATIONAL NOMINEES ESTABLISHMENT

v.

THE REPUBLIC OF GUINEA, APPELLANT
UNITED STATES OF AMERICA, INTERVENOR

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 78-00388)

Argued January 25, 1982

Decided November 12, 1982

Stephen N. Shulman, with whom *Mark C. Ellenberg* and *Mary M. Kearney* were on the brief, for appellant.

David Michael Cohen, Attorney, Department of Justice, with whom *Charles F. C. Ruff*, United States Attorney at the time the brief was filed, *William Kanter*, *Linda M. Cole*, and *James G. Hergen*, Attorneys, Department of Justice; and *James H. Michel* and *Jonathan B. Schwartz*, Attorneys, Department of State, were on the brief, for intervenor.

Mattaniah Eytan, with whom *Julius Kaplan* and *James W. Schroeder* were on the brief, for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before ROBINSON, *Chief Judge*, EDWARDS, *Circuit Judge*, and MCGOWAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* MCGOWAN.

MCGOWAN, *Senior Circuit Judge*: The Republic of Guinea ("Guinea") appeals from, and raises numerous challenges to, the District Court's order confirming an arbitration award rendered by the American Arbitration Association in favor of Marine International Nominees Establishment ("MINE"). The District Court lacked subject matter jurisdiction, Guinea claims, because Guinea was immune under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891; because the arbitration clause contained in the parties' contract precluded the exercise of jurisdiction under the FSIA; and because the FSIA does not, and cannot constitutionally be read to, confer subject matter jurisdiction over suits between foreign plaintiffs and foreign states. Guinea also contends that MINE's service of process upon it did not meet the requirements of the FSIA and that the arbitration award itself was defective and unenforceable.

We reach only the first of these arguments, because we conclude that Guinea was immune under the FSIA and therefore that the court lacked subject matter jurisdiction to confirm the award. Accordingly, we reverse.

I

The following facts, unless indicated otherwise, are not disputed by the parties. The Republic of Guinea is a foreign sovereign state, and MINE is a Liechtenstein corporation. On August 19, 1971, Guinea and MINE [1] entered into a contract providing for the creation of a "mixed economy company" that became known as "SOTRAMAR."

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[1] The signatories to the contract were Guinea and the Inter Maritime Bank, which acted "in the name and on behalf of" MINE. Joint Appendix ("J.A.") 207.

J.A. 205-27.[2] The purpose of the contract, as seen by both MINE and Guinea, was to establish and provide shipping services to transport Guinean bauxite to foreign markets. Appellant's Br. 4-5; Appellee's Br. 4; J.A. 209. The contract detailed the obligations of the parties and included provisions concerning capital and profits, operation, management, labor, professional training, and tax treatment. One "special provision" stated that the parties would make a market study and set up a technical and economic dossier, and that "mixed technical commissions" would study such matters as organization and finances. All these studies were to take place before SOTRAMAR was formed. J.A. 225. Although Guinean law was to be "applicable" to the contract, the contract stated that the "law between the parties" was the contract itself, and therefore that "Guinean laws shall be used for the interpretation and the implementation of this Agreement only accessorily and only in the case where the Agreement would leave a problem unsolved." J.A. 222-23.

The contract also contained several provisions relating to the settlement of disputes. When disagreements arose, the parties were first to attempt informal conciliation. If that effort failed, the parties were then to submit the conflict to arbitration by means of the method described in the contract—a panel of three arbitrators "selected by the President of CIRDI at the joint request of the parties or, failing this, at the request of the most diligent party." J.A. 226. "CIRDI" is the French acronym for the International Centre for Settlement of Investment Disputes. A codicil to the contract stated that the arbitrators would be chosen by the "President of the International Court of Settlement of International Disputes [sic] in Washington (CIRDI)." J.A. 229.

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[2] "SOTRAMAR" is an acronym for the "Societe Mixte de Transports Maritimes," Appellant's Brief ("Br.") 4, or the "Societe Guineenne de Transports Maritimes," Appellee's Br. 5.

Although we will discuss later the parties' disagreement over the exact meaning of these arbitration provisions, a brief description of the International Centre for Settlement of Investment Disputes ("ICSID") should be helpful at this point. ICSID was established by an international agreement, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 ("the Convention"), to which the United States and more than seventy-five foreign countries are parties. Although ICSID is seated in Washington, D.C., its purpose is to provide an international conciliation and arbitration forum. Convention art. 1(2). An ICSID arbitration is not undertaken by ICSID itself, but by arbitral tribunals constituted in accordance with the provisions of the Convention and subject to rules promulgated by ICSID. When two eligible parties consent to submit a dispute to an ICSID arbitration, that course is deemed to be their sole remedy unless they specify othewise. *Id.* art. 26. Following the execution of a valid consent, either party may invoke the ICSID arbitration process, even if the other party refuses to participate. *Id.* art. 36. An ICSID award, even when rendered in such a default proceeding, is final and binding on the parties. *Id.* arts. 45, 53.

Although some SOTRAMAR-related activities took place after the contract was signed, SOTRAMAR never became an operating commercial entity. A rift developed between the parties, and in January 1975 the parties signed a form purporting to present their differences to an ICSID arbitration. Appellant's Br. 7; Appellee's Br. 56-57; J.A. 46.

What took place next is disputed. By Guinea's account, MINE agreed to file with ICSID the consent and a formal arbitration request; MINE took no such action but instead determined that the consent form was technically deficient; MINE mailed a purportedly correct revised form to Guinea; Guinea never received this form; and

MINE made no effort to determine whether the revised form had reached Guinea. Appellant's Br. 7. MINE states that it perceived a deficiency in the first consent form and "urged" Guinea to execute a new form, but that Guinea then "broke off all relations and refused to communicate further with MINE." Appellee's Br. 6. ICSID files contain no record of any request for arbitration in connection with the SOTRAMAR contract. J.A. 236 (letter from Acting Secretary-General of ICSID to counsel for Guinea (Dec. 8, 1980), Exhibit 7 to Guinea's Motion to Dismiss and Opposition to Motion to Confirm Arbitration Award and Enter Judgment).

On January 20, 1978—some three years after the first consent form was signed—MINE filed, in federal district court, a petition to compel arbitration under section 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4 (1976), asserting subject matter jurisdiction under the FSIA and the FAA. J.A. 6. In essence, section 4 of the FAA empowers a federal district court to order arbitration to proceed in accordance with the terms of an arbitration agreement when adequate findings are made that an agreement did exist and that a default under the agreement did occur. Another relevant section of the FAA, section 5, 9 U.S.C. § 5 (1976), sets forth the circumstances when a court is additionally authorized to order arbitration before an arbitrator or arbitrators not named in the agreement. One such instance occurs when a party "fail[s] to avail himself" of the agreed-upon method for naming arbitrators. *Id.*

Drawing on these provisions, the petition to compel set forth a series of allegations, with exhibits attached, to demonstrate that the court should order the parties to proceed to arbitration before the American Arbitration Association ("AAA"). In essential part, MINE maintained that it had prepared the joint consent form "in accordance with the terms" of the SOTRAMAR contract, that it had then prepared a corrected consent form and had mailed it to Guinea, and that Guinea had "failed and

refused either to sign the revised submission or to proceed with arbitration." J.A. 8-9. As a result, MINE continued, it could not initiate an ICSID aribtration. J.A. 9.

Because in MINE's view these facts demonstrated that Guinea intended not to abide by the agreed-upon arbitration method, *id.*, the petition went on to assert that no longer was that method available. *Id.* An order to compel arbitration was therefore proper, "since procedures are available [under section 5] to have a court appoint an arbitrator for the non-cooperating party." J.A. 10.

MINE served process upon Guinea by mailing, via registered mail, copies of the relevant documents to the Ministry of Foreign Affairs in Conakry, Guinea. MINE also sent the same documents by certified mail to the Embassy of Guinea in Washington, D. C. J.A. 47. Guinea did not respond to these documents.

The District Court heard argument on the petition on June 15, 1978; Guinea made no appearance. That same day, the court entered an order granting MINE's petition and ordering arbitration before the AAA and in accordance with the rules of the AAA. J.A. 48. The order set forth the court's conclusions that service had been proper under the FSIA, that the existence of an arbitration agreement and the failure to comply therewith were not in issue, and that Guinea's failure to avail itself of the agreed-upon arbitration method had frustrated the intent of that agreement. The order did not specifically state the basis for the court's subject matter jurisdiction. The clerk of the District Court served copies of the order, by registered mail, upon the Ministry of Foreign Affairs in Guinea and upon the Embassy of Guinea in Washington, D.C. J.A. 50.

MINE then filed, on September 5, 1978, a demand for arbitration before the AAA, J.A. 102, serving notice of the demand upon Guinea by the same method it had followed earlier. J.A. 110. The demand alleged several

breaches of the SOTRAMAR agreement, including Guinea's failure to give to SOTRAMAR's management the necessary authority to conclude contracts for the carriage of bauxite and the provision of services, as well as Guinea's grant to another company of the bauxite rights reserved to MINE. J.A. 105-06. Arbitration hearings took place on February 5, 6, and 7, 1979; May 25, 1979; and April 14, 1980. J.A. 95-100 (affidavit of James W. Schroeder, Exhibit C to MINE's Motion to Confirm Arbitration Award and Enter Judgment). During these proceedings, the AAA served upon Guinea various documents concerning the arbitration, *id.*; Guinea did not appear or file any response. On June 9, 1980, the arbitrators rendered an award in excess of $25 million, which primarily represented compensatory damages for breach of contract. J.A. 86-87.

MINE then returned to the District Court, filing on August 22, 1980, a motion to confirm and enter judgment on the arbitration award under section 9 of the FAA, 9 U.S.C. § 9 (1976). J.A. 51. Accompanying the motion was a memorandum of points and authorities, with exhibits attached. Once again, MINE served process upon Guinea by the method followed earlier.

On December 9, 1980, Guinea entered the proceedings for the first time, filing a motion to dismiss for lack of subject matter jurisdiction. Record ("R.") 21. Guinea also filed a memorandum of points and authorities in support of the motion to dismiss and in opposition to MINE's motion to confirm. J.A. 125. In brief outline, the memorandum argued that neither the FAA, the commercial rules of the AAA, nor the FSIA provided the court with subject matter jurisdiction to entertain either MINE's earlier petition to compel or the motion to confirm. J.A. 134-40. The memorandum also contended that the court's earlier order to compel rested on an incorrect premise, because an ICSID arbitration had indeed been available.

MINE then filed, on January 5, 1980, a memorandum in reply to Guinea's motion to dismiss and in further support of its own motion to confirm. J.A. 237. Attached to the document were supporting exhibits.

The court heard oral argument from the parties on January 8, 1981, focusing attention on the issue of subject matter jurisdiction under the FSIA.[3] On January 12, 1981, the court entered an order denying Guinea's motion to dismiss, granting MINE's motion to confirm, and entering judgment on the award. R. 25.[4] The court also issued a four-page memorandum opinion primarily discussing its conclusion that it had subject matter jurisdiction under the FSIA. *In re Arbitration between Maritime International Nominees Establishment v. Republic of Guinea*, 505 F. Supp. 141 (D.D.C. 1981) (mem.) [*"MINE v. Guinea"*].

On January 16, 1981, Guinea filed a motion for a new trial or, in the alternative, for relief from judgment, on the ground that newly discovered evidence showed that MINE's service of process had been invalid under the FSIA. J.A. 305. Also on that day, Guinea moved for a stay of the judgment until the District Court had ruled on the motion for a new trial, or, in the alternative, for shortening the time for MINE to respond to Guinea's motion for a new trial. R. 28. That same day, MINE submitted an affidavit in opposition to both motions. J.A. 322.[5] On January 21, 1981, the District Court entered

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[3] At the outset of the hearing, the court stated, "The issue that concerns the Court the most and the one that seems to me that you ought to focus your arguments on is, basically, the jurisdictional question." Transcript of January 8, 1981, Hearing, at 3.

[4] On March 11, 1981, upon motion of both parties, the District Court corrected this with respect to the amount of the award. J.A. 297.

[5] MINE sought to make a fuller reply to the contentions advanced in Guinea's motions by filing on January 23, 1981,

an order denying both of Guinea's motions but allowing Guinea five days to seek from this court a stay pending appeal. J.A. 325. Also on January 21, Guinea filed a notice of appeal from the January 12 order confirming the arbitration award.[6] The next day, Guinea moved this court for a stay pending appeal; on January 23 that motion was granted and execution of judgment was stayed until a decision on the merits or further order of the court.[7]

II

Guinea's challenges to the confirmation order fall into three categories.[8] First, it claims that the District Court lacked subject matter jurisdiction because: (1) the court

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a motion for leave to complete the record. J.A. 326. The District Court granted the motion on February 10, 1981. R. 34.

[6] The same day, Guinea filed with the District Court a motion for a stay pending appeal. R. 30.

[7] On September 18, 1981, this court entered an order granting the United States leave to intervene pursuant to 28 U.S.C. § 2403 (1976), and allowing the United States to file a suggestion of interest. In addition to the regular cycle of briefing in this case, therefore, we have received a Brief for the United States as Intervenor and Suggestion of Interest, and briefs from MINE and Guinea in reply to the United States's brief.

[8] Although Guinea directs some of its arguments both to the order to compel and the order to confirm, *see, e.g.*, Appellant's Br. 25, it is clear that the only order on review before us is the order to confirm. An order to compel arbitration issued in an independent proceeding under the FAA is a final and appealable judgment. *See* Chatham Shipping Co. v. Fertex Steamship Corp., 352 F.2d 291 (2d Cir. 1965); 9 Moore's Federal Practice ¶ 110.20[4.-1] (2d ed. 1982). *Cf.* Goodall-Sanford, Inc. v. United Textile Workers, 353 U.S. 550 (1957) (order directing arbitration under section 301(a) of the Taft-Hartley Act, 29 U.S.C. § 185(a) (1976), is appealable as a final judgment). Guinea cannot now, by way of appealing the confirmation order, obtain review of the earlier order to compel.

erred in ruling that Guinea was not immune under the FSIA; (2) even assuming non-immunity, the FSIA does not purport to confer subject matter jurisdiction over suits between foreign plaintiffs and foreign states; (3) the FSIA would be unconstitutional if read to confer such jurisdiction; and (4) the signing by both parties of the first ICSID consent form committed them to an ICSID arbitration and therefore deprived the District Court of jurisdiction.

Second, Guinea claims that MINE's service of process upon it was inadequate under the FSIA, and therefore that the District Court lacked personal jurisdiction under the FSIA. Third, Guinea attacks the arbitration award itself, contending (1) that the arbitrators exceeded their authority by disregarding the liquidated damages provision of the contract, (2) that the arbitrators lacked power to delegate the task of damage calculation to an accounting firm, (3) that the award was based on evidence outside the record, and (4) that MINE obtained an AAA arbitration by misrepresenting before the District Court the availability of an ICSID arbitration.

Because we hold that the court lacked subject matter jurisdiction to confirm the arbitration award, we need not address the service of process issue or the validity *vel non* of the arbitration award itself. And, because this jurisdictional holding rests on our conclusion that the condition for subject matter jurisdiction under the FSIA—non-immunity—was not met, we do not reach the second, third, or fourth of Guinea's subject matter jurisdiction arguments.[9]

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[9] MINE has not argued that the District Court's finding that it had jurisdiction under the FSIA in the earlier section 4 proceeding to compel bars Guinea from questioning the District Court's exercise of jurisdiction in the section 9 proceeding to confirm now under review. Because the section 9 proceeding adjudicated a different claim from that in the earlier proceeding, any preclusive effect would derive from the doctrine of collateral estoppel. *See* Commissioner v. Sun-

III

With the passage of the FSIA, Congress enacted a comprehensive scheme setting forth "when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States," and "when a foreign state is entitled to sovereign immunity." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 6 (1976). The application of this scheme requires some unraveling of the Act's interlocking provisions governing the separate issues of subject matter jurisdiction, sovereign immunity, and personal jurisdiction.

Subject matter jurisdiction is addressed by section 1330(a), 28 U.S.C. § 1330(a) (1976), which creates in federal district courts

> original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

The Act thereby connects the issue of subject matter jurisdiction to the issue of sovereign immunity: the absence of immunity is a condition to the presence of subject matter jurisdiction.

Personal jurisdiction is governed by section 1330(b), *id.* § 1330(b):

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nen, 333 U.S. 591, 597-98 (1948); Nasem v. Brown, 595 F.2d 801, 805 n.8 (D.C. Cir. 1979). That doctrine requires that even issues less basic than jurisdiction be fully litigated before they are preclusively established. *See* McCord v. Bailey, 636 F.2d 606, 609 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); 1B Moore's Federal Practice ¶ 0.443[3] (2d ed. 1982). Guinea did not appear in the first proceeding, so the issue was not fully litigated and may be raised at this time.

> Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

In other words, a lack of subject matter jurisdiction also deprives the court of personal jurisdiction under the Act.

Whether subject matter and personal jurisdiction existed under the Act, then, turns in the first instance on whether Guinea was entitled to immunity under sections 1605 and 1607. These sections set forth the exceptions to the general principle, stated in section 1604, *id.* § 1604, that foreign states are immune from the jurisdiction of federal and state courts, subject to existing international agreements to which the United States was a party at the time of the Act's passage. Of these exceptions, only subsections (a)(1) and (a)(2) of section 1605 have possible relevance to this case; the District Court found that each supported a finding of non-immunity and, hence, of subject matter jurisdiction.

A.

Section 1605(a)(1) states that a foreign state shall not be immune in any case

> in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

The SOTRAMAR codicil, we recall, stated that the parties would arbitrate before arbitrators selected by the "President of the International Court of Settlement of International Disputes [sic] in Washington (CIRDI)." J.A. 229.

Applying section 1605(a)(1) to the parties' agreement, the District Court began by noting that ICSID's Rules of Procedure call for ICSID tribunals to meet at the

seat of ICSID—Washington, D.C.—unless another site is agreed upon by the parties and approved by ICSID. *MINE v. Guinea*, 505 F. Supp. at 143. Therefore, the court reasoned, the parties must have contemplated that arbitration would take place in the United States. Because the legislative history indicates that implicit waiver may be found "in cases where a foreign state has agreed to arbitration in another country," H.R. Rep. No. 94-1487, *supra*, at 18, the court concluded that the SOTRAMAR arbitration clause constituted such a waiver. *MINE v. Guinea*, 505 F. Supp. at 143.

Guinea challenges this conclusion on the ground that an agreement to submit future disputes to an ICSID arbitration cannot be deemed an implied waiver of immunity within the meaning of the FSIA.[10] Appellant's

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[10] MINE also argues that the SOTRAMAR contract constituted an explicit waiver of immunity within the meaning of section 1605(a)(1). Appellee's Br. 19-20. MINE can point to no particular provision in the contract arguably concerning immunity; rather, MINE rests its argument on the fact that the SOTRAMAR venture was a "mixed-economy" company under the laws of Guinea. Participation in such a company amounted to an explicit waiver, in MINE's view, because Guinean law provides that the state in a mixed economy company is a shareholder and that the state's rights and obligations are derived from its standing as a shareholder rather than as a state. *Id.*

Although a state can explicitly waive its immunity in a contract with a private party, H.R. Rep. No. 94-1487, *supra*, at 18, MINE's argument falls far short of demonstrating such a waiver. This becomes clear upon reading the House Report's comments about withdrawals of waivers:

> [I]f the foreign state agrees to a waiver of sovereign immunity in a contract, that waiver may subsequently be withdrawn only in a manner consistent with the expression of the waiver in the contract. Some court decisions have allowed subsequent and unilateral rescissions of waivers by foreign states. But the better view, and the one followed in this section, is that a foreign state which has induced a private person into a contract by promising

Br. 26-28. MINE, however, claims that we need not read the District Court as implying the proposition that Guinea attacks. According to MINE, the SOTRAMAR arbitration clause did not contemplate a formal ICSID arbitration, but merely provided for a non-ICSID arbitration to be undertaken by arbitrators chosen by ICSID's President. Appellee's Br. 23 n.16, 56. The only question we must decide, MINE asserts, is whether the clause, when read this way, constitutes an implicit waiver of immunity.

We reject MINE's suggested rationale. The factual premise on which it rests—that the parties contemplated a non-ICSID arbitration—was never argued by MINE before the District Court. Instead, in the confirmation proceedings MINE did not depart from the position it had presented in the original petition to compel arbitration: that the parties had intended to submit future disputes to an ICSID arbitration, and that Guinea had prevented the effectuation of that intent.[11]

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not to invoke its immunity cannot, when a dispute arises, go back on its promise and seek to revoke the waiver unilaterally.

Id. These statements suggest that Congress contemplated waivers of a much more specific and explicit nature than the one MINE constructs from the operation of this Guinean law.

[11] Included in the record are several exhibits filed by MINE in connection with its motion to confirm. One of them, a copy of the "Demand for Arbitration" that MINE presented to the AAA, contains the following statement:

> Disputes between M.I.N.E. and Guinea arose out of and relating to the Agreement. In 1975, M.I.N.E. sought to obtain from Guinea a proper and correct joint submission of their dispute to ICSID. Guinea, however, failed and refused to sign such a submission or to proceed with arbitration. The refusal by Guinea to execute a revised joint submission or otherwise cooperate with M.I.N.E.'s efforts made unavailable the method originally agreed upon by the parties for choosing arbitrators.

J.A. 103. A reference in another exhibit echoes the allegation that the failure to sign a submission to ICSID frustrated

The District Court's waiver holding, moreover, was clearly based on the factual conclusion that the parties had contemplated an ICSID arbitration. As stated above, a central ingredient of that holding was the ICSID procedural rule stating that ICSID arbitrations shall normally take place at ICSID's seat in Washington, D.C. From this rule the court inferred that the parties must have anticipated that arbitration would occur in the United States. *MINE v. Guinea*, 505 F. Supp. at 143. Obviously, the court would not have attached significance to the ICSID rules had it not understood the SOTRAMAR clause as contemplating an arbitration that would be subject to those rules—an ICSID arbitration.

We will not consider on appeal an argument that rests on a factual premise never developed before the District Court. *See Carr v. District of Columbia*, 543 F.2d 917, 921-22 (D.C. Cir. 1976). Instead, we must evaluate the proposition represented by the District Court's holding—that the parties' agreement to submit future disputes to an ICSID arbitration can be deemed an implicit waiver of immunity within the meaning of section 1605(a)(1).[12]

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the method "originally agreed upon by the parties." J.A. 93 (affidavit of MINE's then-attorney). The clear import of these statements is that the parties contemplated an ICSID arbitration.

MINE tries to reconcile these earlier representations with the theory that the parties contemplated a non-ICSID arbitration by offering the following scenario: MINE "approached ICSID to determine how and when the President might select the three arbitrators"; ICSID personnel informed MINE that "such a procedure is unknown to the organization"; MINE "reluctantly concluded that the informal procedure . . . could not be accomplished"; and only then did the parties sign the ICSID consent form. Appellee's Br. 55-56. These allegations were never presented to the District Court, and we will not now consider the argument that MINE bases on them.

[12] Of course, to say that the parties agreed to a future ICSID arbitration says nothing about whether the parties

Explaining this section, the House Report stated:

> With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract.

H.R. Rep. No. 94-1487, *supra*, at 18. Because the SOTRAMAR contract expressly stated that the law of Guinea would apply to interpretation of the contract, J.A. 222, only the first instance mentioned in the quoted language is relevant to the question at hand.[13] Upon considering this phrase in light of the nature of an ICSID arbitration, we conclude that the SOTRAMAR agreement was not an implicit waiver of immunity within the meaning of the FSIA.

As noted earlier, ICSID was established by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, an international agreement to which more than seventy-five foreign states are parties. Under the Convention, which has been implemented by legislation in the United States, 22 U.S.C. §§ 1650-1650a (1976), ICSID has "full international legal personality," Convention art. 18. ICSID's

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ever took any action that was sufficient to effect that intent. It is the former issue that is relevant to the waiver question, and our discussion of waiver should not be read as implying anything about the latter.

[13] Of course, an agreement to apply Guinean law is literally an agreement to apply the law of a "particular" country. Courts have generally assumed, however, that Congress did not endorse the literal wording of the House Report, for when paraphrasing the report they say waiver is to be found when a foreign state agrees to apply the law of "another" country. *See* Ohntrup v. Firearms Center Inc., 516 F. Supp. 1281, 1284 (E.D. Pa. 1981) (mem.); Castro v. Saudi Arabia, 510 F. Supp. 309, 312 (W.D. Tex. 1980). Because MINE has not questioned this reading of congressional intent, we see no reason to do so at this time.

purpose is to make available to "Contracting States and nationals of other Contracting States" facilities for the conciliation and arbitration of investment disputes. *Id.* art. 1(2). ICSID arbitrations are undertaken by tribunals constituted under the Convention and subject to the rules of ICSID. *Id.* art. 44. In settling disputes, those tribunals apply "such rules of law as may be agreed by the parties"; when no such agreement exists, the law of the "Contracting State party" and rules of international law apply. *Id.* art. 42(1).

A primary motivation for the Convention was the recognition that international methods of dispute settlement should be available in addition to national legal processes. *Id.* preamble. As stated in an ICSID general information document, ICSID "provides means for a Contracting State to have a dispute with an investor internationally adjudicated without having to bring action in a foreign court or to undertake intergovernmental litigation with the investor's State." International Centre for Settlement of Investment Disputes, Doc. ICSID/12, *reprinted in* Appellant's Addenda.

The provisions governing ICSID arbitrations give effect to this aim. Article 26 of the Convention states: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy." In addition, the ICSID processes are self-executing once a proper request is submitted to ICSID: an arbitral tribunal is constituted upon receipt of the request, the tribunal itself decides the issue of jurisdiction, and awards rendered by the tribunal are certified by ICSID as binding and enforceable. *Id.* arts. 36, 41, 49, 53.

Relying on these facts, the State Department has urged this court to find that agreements to arbitrate with ICSID do not contemplate the involvement of domestic courts, at least not before a final ICSID decision is to be

enforced.[14] Brief for the United States as Intervenor and Suggestion of Interest 54. We need not reach this precise question here, however. MINE has insisted, and is estopped from denying, that United States courts were powerless to compel an ICSID arbitration under this particular arbitration agreement. Appellee's Br. 57 & n.49; Appellee's Reply Br. to Br. for United States 23, 25; J.A. 253 (memorandum before District Court) ("as both ICSID and its President enjoy sovereign immunity, this court could not compel the President of the World Bank to appoint arbitrators in this matter"). MINE contended that an ICSID arbitration was unavailable in order to induce the District Court to go beyond the express terms of the arbitration clause and compel arbitration before the American Arbitration Association. Given that this point is now established for purposes of this litigation, we have no trouble holding that this particular ICSID agreement was not an agreement "to arbitration in another country" that waives sovereign immunity under the FSIA.[15] A key reason why pre-FSIA

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[14] At the enforcement stage, the ICSID treaty, *see* Convention art. 54, and a supporting United States statute, 22 U.S.C. § 1650a (1976), provide that ICSID arbitrations are to be enforced as judgments of sister states. We need not decide whether Guinea's signing of the ICSID treaty would thus waive its immunity from proceedings enforcing ICSID awards, for this is a proceeding to confirm an *AAA* arbitration. We also do not express opinions (1) whether any waiver of immunity for ICSID *enforcement* proceedings would also waive immunity for suits to *compel* ICSID arbitrations, or (2) whether Congress's declaration that the Federal Arbitration Act "shall not apply to enforcement of awards rendered" by ICSID, *id.*, prohibits proceedings to *compel* ICSID arbitrations. Resolution of neither point is implicit in our holding today, for we decide that this ICSID agreement did not contemplate the involvement of domestic courts before the enforcement stage only because MINE cannot contend otherwise in this litigation.

[15] Because the ICSID arbitration was to take place in the United States unless otherwise specified, *see* pp. 12-13 *supra*,

cases found that an agreement to arbitrate in the United States waived immunity from suit was that such agreements could only be effective if deemed to contemplate a role for United States courts in compelling arbitration that stalled along the way. *See, e.g., Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 363-64 (2d Cir. 1964) (discussing consent to in personam jurisdiction), *cert. denied*, 381 U.S. 934 (1965); *see also* Note, *Maritime International Nominees Establishment v. Republic of Guinea*: Effect on U.S. Jurisdiction of an Agreement by a Foreign Sovereign to Arbitrate Before the International Centre for the Settlement of Investment Disputes, 16 Geo. Wash. J. Int'l L. & Econ. 451, 463-66 (1982). As this particular ICSID agreement concededly did not foresee such a role for United States courts, we hold that it did not waive Guinea's sovereign immunity even though the agreed-to arbitration would probably take place on United States soil.

B.

The second immunity provision relevant to this case is section 1605(a)(2). This section sets forth, in the words of the House Report, "probably the most important instance in which foreign states are denied immunity, that in which the foreign state engages in a commercial activity." H.R. Rep. No. 94-1487, *supra*, at 18. The section states that a foreign state shall not be immune in any case

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we need not speculate about whether the courts of some other country might find themselves empowered to compel an ICSID arbitration. Thus, although other courts have found it necessary to hold that only an agreement to arbitrate in *this* country will waive a sovereign's immunity in United States courts, *see* Ohntrup v. Firearms Center Inc., 516 F. Supp. 1281, 1285 (E.D. Pa. 1981) (mem.); Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1301-02 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *cert. granted*, 102 S. Ct. 993 (1982), we do not settle that question here.

> in which the action is based upon [1] a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

The District Court seems to have held that both the first and third clauses of the section were satisfied. *MINE v. Guinea*, 505 F. Supp. at 143. After stating this conclusion, the court went on to list the activities of Guinea that supported it:

> Numerous meetings were held, including meetings in Connecticut and in the District of Columbia, relating to the contract. Guinea directed an American shipping group to perform substantial activities to aid SOTRAMAR. The Guinean ambassador to the United States engaged in several business-oriented contacts with officials of petitioner [MINE] related to the project.

MINE v. Guinea, 505 F. Supp. at 143. The sum of these activities, the court continued, was "more than sufficient to constitute commercial activity within the meaning of section 1605(a)(2)." *Id.* To examine this holding, we turn separately to the first and third clauses of section 1605(a)(2).[16]

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The first clause, like the remaining two, contains the phrase "commercial activity," which the Act defines as follows:

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[16] The second clause has no relevance to this case. The "act" on which this action is "based"—the alleged breach of the SOTRAMAR contract—is not claimed to have been "performed in the United States."

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d) (1976). The first clause receives further definition:

> A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

Id. § 1603(e).

Part of the first clause is easily applied in this case. The "regular course of commercial conduct" or "particular commercial transaction" on which MINE's action "is based" is the SOTRAMAR contractual undertaking; that activity clearly is of the commercial nature contemplated by the Act's exceptions. *See* H.R. Rep. No. 94-1487, *supra*, at 16. The more difficult question is whether the SOTRAMAR venture was "carried on in the United States by a foreign state," that is, "carried on by such state and having substantial contact with the United States." Upon examining the findings of the District Court,[17] we must answer this question in the negative.

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[17] MINE adds to these findings the argument that Guinea's alleged breach resulted in "contact with the United States" for purposes of the first clause: "Each ton of bauxite which should have been carried by SOTRAMAR to destinations in the United States was instead carried to those same destinations by Afro-Bulk." Appellee's Br. 26. The District Court made no such finding, and MINE supports its contention in part with evidence outside the record. *Id.*; *see* Fed. R. App. P. 10. As will be clear from our discussion of the contacts listed by the District Court, the record properly before us cannot sustain the assertion, implicit in MINE's argument, that under the SOTRAMAR contract arrangements had been made to transport bauxite to destinations in the United States.

We turn first to the District Court's conclusion that "Guinea directed an American shipping group to perform substantial activities to aid SOTRAMAR." *MINE v. Guinea*, 505 F. Supp. at 143. An analysis of this finding must immediately confront the Act's requirement that the commercial activity be "carried on by" the foreign state. We have no doubt that in appropriate circumstances the activities of another may be attributed to the foreign state for purposes of the section 1605(a)(2) exception. Especially given the realities of modern commercial undertakings, a contrary conclusion would undermine "Congress's concern with providing 'access to the courts' to those aggrieved by the commercial acts of a foreign sovereign," *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 312 (2d Cir. 1981) (quoting H.R. Rep. No. 94-1487, *supra*, at 6), *cert. denied*, 102 S. Ct. 1012 (1982). On the other hand, this same principle and the words of the statute impose some limits on when a foreign state can be deemed to have "carried on" activities actually performed by another.

The legislative history gives some guidance in discovering those limits. Although Congress did not elaborate on the "carried on by" requirement, it stated that some activities falling within the first clause of section 1605(a)(2) might also satisfy the second: an "act performed in the United States in connection with a commercial activity of the foreign state elsewhere." One example of the latter, Congress went on, might be "a representation in the United States by an agent of a foreign state that leads to an action for restitution based on unjust enrichment." H.R. Rep. No. 94-1487, *supra*, at 19. This reference to "an agent of a foreign state" suggests that a foreign state, in Congress's view, can surrender immunity by virtue of activities committed by an agent, and that, consequently, the "carried on by" requirement can be interpreted in light of broad agency principles. While we do not suggest that those principles should be applied

rigidly and in all their detail to the immunity determination, it seems evident that to throw the net of responsibility much wider would be to ignore the words Congress employed in both the statute and the legislative history.

We also think it appropriate to note the well-established principle that, in assessing personal jurisdiction under either a constitutional due process standard or a statutory standard, courts may look to the contacts between the forum and agents of the defendant. *Texas Trading*, 647 F.2d at 314-15; C. Wright & A. Miller, Federal Practice and Procedure § 1069, at 251-52 (1969). This principle is of relevance to the immunity exception because Congress viewed that exception not only as governing the immunity determination, but also as representing a central component in the Act's structure for personal jurisdiction:

> For personal jurisdiction to exist under section 1330 (b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. . . . These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction.

H.R. Rep. No. 94-1487, *supra*, at 13. Although we do not understand this statement to mean that the statutory standard for determining non-immunity is coextensive with the due process standard governing personal jurisdiction,[18] *see World-Wide Volkswagen Corp. v. Woodson*,

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[18] Of course, a finding of FSIA personal jurisdiction, which would rest in part on a finding of non-immunity, must comport with the demands of due process, and Congress intended that the Act satisfy those demands, H.R. Rep. No. 94-1487, *supra*, at 13. But the immunity determination involves considerations distinct from the issue of personal jurisdiction, and the FSIA's interlocking provisions are most profitably analyzed when these distinctions are kept in mind. *See generally* Texas Trading & Milling Corp. v. Federal Republic of

444 U.S. 286 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), we think it relevant that viewing the "carried on by" requirement in light of agency principles would be compatible with well-established due process analysis.

Our views find support in several decisions of other courts. In *Yesenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849 (S.D.N.Y. 1978), plaintiff filed a libel suit against three defendants, two of which were Soviet Union information agencies that claimed immunity under the FSIA. Both were alleged to have written defamatory articles and to have caused the publication of those articles in periodicals that were circulated to the public in the United States. Applying the section 1605(a)(2) exception, the court rejected the relevance of the first clause, because "the allegedly offending articles were published outside the country and sent into the United States by means wholly outside the control of either [defendant]." *Id.* at 855. The court, in other words, properly rejected the proposition that a foreign state "carries on" activities performed by another entity simply because the state and that entity, although unconnected with each other, can both be seen as participating in the same larger commercial endeavor.

In *Bankers Trust Co. v. Worldwide Transportation Services, Inc.*, 537 F. Supp. 1101 (E.D. Ark. 1982), a restitution action involving as one defendant an official agricultural organ of the Federal Republic of Mexico, the court held that the "commercial activity" of that defendant included activities performed by a bank and a company acting as the defendant's agents in the United States.

Before examining against this conceptual backdrop the District Court's finding that "Guinea directed an

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Nigeria, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1912 (1982); Kane, Suing Foreign Sovereigns: A Procedural Compass, 34 Stan. L. Rev. 385, 402-04 (1982).

American shipping group to perform substantial activities to aid SOTRAMAR," we should examine the evidence in the record relevant to that finding. The record discloses that fairly substantial SOTRAMAR-related activities were undertaken in the United States by a company usually referred to as "Global." J.A. 265, 270-72. There is evidence that Global maintained an office in Stamford, Connecticut. J.A. 270-71.

Global's activities can be grouped under two categories. First, there is evidence that Global played a major role in preparing a report, termed a "feasibility" or "technical" study, in connection with the SOTRAMAR venture. J.A. 273, 288. In connection with this report, the record suggests, Global held meetings, expended funds, and prepared route and rate computations in the United States. J.A. 270-72. Second, the record contains evidence that Global's connection with SOTRAMAR went beyond the preparation of the report, and extended also to involvement in the shipping of Guinean bauxite. J.A. 275-77.

As to the connection between MINE and Global, the record contains evidence of communication and cooperation between MINE and Global on the report. J.A. 270-72. There are also statements in the record that suggest communication between MINE and Global with respect to Global's other activities. J.A. 276-78. No evidence at all concerns the nature of Global's corporate structure, and the only evidence of the organizational relationship between MINE and Global are the several references to "MINE/Global." J.A. 231, 233.

The record casts an even dimmer light on the connection between Guinea and Global. The second codicil to the SOTRAMAR contract contains two references to "MINE/Global." The first notes that delegates of Guinea and of MINE Global met to agree upon the codicil. J.A. 231. The second states:

> In order to make it compatible with that option of lease-sale of a part of the ships supplied by MINE/

> GLOBAL, the Addendum [the first codicil] of October 11, 1971 is added to as follows:
>
> "The other ships shall fly a flag agreed to by both parties, which flag in fact shall be the neutral one of Panama for the duration of the lease-sale."

J.A. 233.

Finally, there is some evidence connecting Guinea with the report. The record includes a letter, dated September 11, 1972 and written by MINE's then-attorney to a Guinean representative, concerning the former's views as to "the problems now facing SOTRAMAR." J.A. 288. The letter contains the following statement:

> Many different methods of obtaining ships for SOTRAMAR have been detailed. For example, at the request of the Guinean partners, MINE prepared an extensive technical study which was presented at the May 1972 meeting in Conakry [Guinea].

J.A. 288. Another record item suggests that MINE and Global, while preparing the report, contemplated presenting it to Guinea at a future date. J.A. 272. Also deserving of mention is the provision in the SOTRAMAR contract stating that the parties would make a "market study" before SOTRAMAR was formed. J.A. 225.

Although the District Court's conclusion that Guinea "directed" Global to perform activities may be interpreted several ways, it can satisfy the first clause only if read to mean that Guinea authorized Global to perform actions on Guinea's or SOTRAMAR's behalf in the United States. *See* Restatement (Second) of Agency §§ 1, 26 (1958). The record cannot sustain this reading, however, even when analyzed with the understanding that the necessary authorization can be conferred by a variety of means, *see id.* § 26.

We note at the outset, with respect both to the preparation of the report and to other activities performed by

Global, that there is no evidence of any written or otherwise express authorization from Guinea to Global. Our inquiry thus becomes whether anything in the record can reasonably be read to imply authorization of Global's services. First, concerning activities related to the report, we find that the record contains no evidence supporting this implication. The statement in the letter from MINE's attorney suggests only that Guinea requested MINE to prepare a report. Although a request to one party may, by its nature or context, necessarily imply the need to enlist the services of another, *see id.* § 79, MINE has not shown that Guinea's request was of this sort. Similarly, MINE has not shown that the provision in the SOTRAMAR contract requiring the parties to make a "market study," J.A. 225, constituted an authorization by Guinea for MINE to use Global's services on Guinea's behalf.

Moreover, the mention in the record that MINE and Global eventually presented the report to Guinea does not evidence sufficient knowledge of or acquiescence in Global's involvement. The record contains nothing to indicate that Guinea monitored or received information about the report during its preparation. One portion of the record, in fact, suggests the opposite. At the arbitration hearings, MINE's former attorney testified as follows:

> So this work [the report] was done in Stamford and with the aid of their [Global's] technicians, their general counsel, me, their outside counsel, Mr. Anada [19] attended substantially all of those meetings from Geneva, other people would come from Geneva, and we worked out how the financing would work, what rates were necessary and so on. Then you will also find it was necessary to show the not too sophisticated Guinean people when they would see this report why it was being done this way.

J.A. 272.

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[19] According to MINE's memorandum in reply to Guinea's motion to dismiss, Mr. Anada was a MINE official. J.A. 239 n.5.

Second, with respect to any non-report-related activities, the record is likewise devoid of evidence from which we can infer implicit authorization. The only record item of any relevance is the second codicil, with its mention that delegates of "MINE/Global" met with Guinea and that the first codicil had been amended "to make it compatible with that option of lease-sale of a part of the ships supplied by MINE/Global." These references, standing alone, are too sparse in detail to allow a conclusion that Global was acting under authority conferred by Guinea.

We must conclude, then, that Guinea did not "carry on" the activities performed by Global. Global, of course, was not the only entity that acted in the United States; several items in the above-described record suggest that MINE also undertook actions there. We hesitate to evaluate these facts at length, for the District Court made no finding that Guinea "directed" these activities. The record might support a conclusion, however, that Guinea requested MINE to prepare a study, *supra* p. 26, and that MINE attended meetings in the United States with Global in connection with that study. *See* J.A. 265, 270-71. We cannot say with certainty that the report requested was actually the same report MINE worked on in the United States. But even if it was, the record does not show that the understanding between MINE and Guinea reached the stage at which MINE's actions in the United States could be deemed to be carried on by Guinea for purposes of the FSIA. Explaining why this is so requires us to sharpen slightly the principles that govern this inquiry.

We have said that Global's activities in the United States cannot waive Guinea's immunity if Guinea did not authorize them. But this is not to say that every action Guinea "authorizes" which eventually touches American soil will waive Guinea's immunity. We find aid in discerning the far reaches of the "carried on" requirement by

considering once more principles of personal jurisdiction.[20] The Supreme Court helped clarify some of those principles in *Hanson v. Denckla*, 357 U.S. 235, 253 (1958):

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. . . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Accord Texas Trading, 647 F.2d at 314-15 (applying test to foreign sovereign).

In this case the record will not support the conclusion that, through MINE's meetings with Global in the United States concerning the preparation of a report, Guinea purposefully availed itself of the benefits of conducting business in the United States. MINE has offered no evidence that Guinea requested that the study be done in the United States. Nor has it shown that preparation of a preliminary market study is an activity necessarily, foreseeably, or likely to be undertaken in the United States. And we do not find MINE's activities in the United States to be so extensive that we will impute to Guinea, without more, a purposefulness that is not otherwise found in the record. We are concerned, of course, by the fact that Guinea in some sense benefited from activities conducted in the United States by MINE. But in an interdependent world economic system many foreign states may benefit from the acts of others in the United States but still not be considered themselves to be conducting business in the United States within the contemplation of Congress. We

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[20] We are bound in a more basic sense, of course, by constitutional precepts of personal jurisdiction, but we go no further than the statute itself to decide this particular question. And we note once more that while personal jurisdiction principles shed light on the immunity determination, the two inquiries are not entirely the same. *See supra* note 18.

thus find that MINE has not proved Guinea to be sufficiently a part of MINE's activities in the United States that Guinea surrendered its immunity by virtue of those activities.[21]

Continuing our search for activity that might satisfy the first clause of section 1605(a)(2), we turn to the District Court's finding that "[n]umerous meetings were held, including meetings in Connecticut and in the District of Columbia, relating to the contract." *MINE v. Guinea*, 505 F. Supp. at 143. There is evidence that meetings took place, but, with one exception, no reference to such a meeting indicates that Guinea was present. Because these references do not contain any information that adds to the evidence of authorization that we have already considered, these meetings cannot be seen as activity "carried on by" Guinea.

The one exception is a meeting between MINE and a Guinean representative or representatives, which took place in a Washington, D.C., hotel in September 1973, and which apparently concerned the operation of SOTRAMAR. J.A. 278, 288. Although this meeting is mentioned in a fairly lengthy letter from MINE's then-attorney to a Guinean representative, the letter primarily summarizes the history of SOTRAMAR-related discussions, and therefore gives no clear sense of the scope of the Washington meeting.[22] Whether the requirement of "substantial con-

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[21] Because we find the link between Guinea on one hand and MINE's report activities in the United States on the other to be too weak to attribute MINE's actions here to Guinea, we necessarily find that the path from Guinea to MINE and then from MINE to Global stretches too far to link Guinea with Global indirectly. We distinguish this point from our discussion earlier, *supra* pp. 26-28, showing the lack of evidence directly linking Global with Guinea.

[22] The letter begins with the following statement:

> Following the meeting of Sunday, September 9, 1973, in Washington, MINE, Inc. believes it useful to lay before

tact" is satisfied requires evaluation not only of this meeting, but also of the District Court's third finding.

Although the third finding states that "[t]he Guinean ambassador to the United States engaged in several business-oriented contacts with officials of [MINE] related to the project," *MINE v. Guinea*, 505 F. Supp. at 143, the record contains a suggestion of only one such contact. A portion of a MINE official's arbitration testimony relates the following:

> But when we discovered about this breach or about the negotiations with Afrobulk, we were very disappointed and we asked for a meeting with the Guineans. We came to see the ambassador in Washington also, asking him—we were sent actually to see him by the government.

J.A. 267. This vague statement is scarcely evidence that a meeting occurred at all, and we can only speculate as to that meeting's scope or nature.

An evaluation of these two contacts under the first clause must begin with the recognition that, in Judge Weinfeld's words, Congress "underscore[d] the fact that the 'commercial activity carried on in the United States' must be substantial to support jurisdiction." *Verlinden B.V. v. Central Bank of Nigeria*, 488 F. Supp. 1284, 1296 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *cert. granted*, 102 S. Ct. 997 (1982). In choosing those words, Congress made clear that the immunity determination under the first clause diverges from

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> you for your consideration the following views of the problems now facing SOTRAMAR.

J.A. 288. No further reference is made to the Washington meeting until near the letter's conclusion:

> In view of the facts set forth above and the references of Your Excellency on September 9, 1973 to the need to change the entire basic SOTRAMAR Convention . . . .

J.A. 291.

the "minimum contacts" due process inquiry, as well as from jurisdictional determinations under state long-arm statutes.[23] We cannot conclude that these two isolated meetings amounted to more than "transitory" and "insubstantial" contact for purposes of the Act, *see Verlinden*, 488 F. Supp. at 1297, especially given their uncertain scope and importance.[24]

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[23] The legislative history does not contradict the clear import of the words Congress chose. Commenting on section 1330(b), which concerns personal jurisdiction under the Act, the House Report stated that the immunity provisions "prescribe the necessary contacts [the "minimum contacts" requirement of International Shoe Co. v. Washington, 326 U.S. 310 (1945)] which must exist before our courts can exercise personal jurisdiction." H.R. Rep. No. 94-1487, *supra*, at 13. To read "substantial contact" as demanding more than "minimum contacts" is fully compatible with this statement.

Congress also noted that section 1330(b) is "in effect, a Federal long-arm statute over foreign states . . . . It is patterned after the long-arm statute Congress enacted for the District of Columbia." H.R. Rep. No. 94-1487, *supra*, at 13. The phrase "patterned after" is not a clear mandate to interpret the immunity exceptions in light of the District of Columbia long-arm statute, and "[t]here are significant differences in language and effect between the District's statute and the Act, which Congress, the author of both, could not have overlooked," *Verlinden*, 488 F. Supp. at 1295. *Accord* Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 311 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1012 (1982); Harris v. VAO Intourist, 481 F. Supp. 1056, 1063-65 (E.D.N.Y. 1979) (mem.). While these differences might not always undermine the usefulness of referring to the District of Columbia statute, *see VAO Intourist*, 481 F. Supp. at 1064-65, the "substantial contact" requirement has not even a remote relative in that statute. *See* D.C. Code § 13-423(a)(1) (1981) (allows personal jurisdiction as to a claim arising from the person's "transacting any business in the District of Columbia").

[24] Although case law construing the phrase "substantial contact" is not extensive, our conclusion finds support by way of contrast with cases that find jurisdiction. *See* Gemini Shipping, Inc. v. Foreign Trade Org. for Chems. & Foodstuffs,

Having concluded that the District Court's three findings do not satisfy the first clause of the section 1605(a)(2) exception, we look next[25] to the third clause of that section:

> A foreign state shall not be immune . . . in any case . . . in which the action is based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

As noted earlier, the District Court may be read as concluding that its three findings met the standard of this clause. The court did not explain, however, how those activities gave rise to a "direct effect in the United States" within the meaning of the Act.

MINE argued before the District Court that the third clause applies because the contractual breach "had a direct effect on Global." J.A. 248. On appeal, MINE renews and elaborates upon this argument with the following assertions: "In the later stages" of the SOTRAMAR venture, Global "became closely allied with MINE"; Global "was to place many of its ships on line to implement direct carriage of bauxite to the United States"; Global

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647 F.2d 317, 319 (2d Cir. 1981) (defendant solicited bids in U.S. and paid under a contract through a letter of credit confirmed by a New York bank); Ohntrup v. Firearms Center Inc., 516 F. Supp. 1281, 1285-86 (E.D. Pa. 1981) (mem.) (sales agreement was between defendant and U.S. corporation; defendant agreed that U.S. corporation would be its representative in U.S.; and agreement called for substantial sales in U.S. within first year of contract); Behring Int'l, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383, 390 (D.N.J. 1979) (contract was negotiated and executed in New York, where defendant maintained office and picked up contracted-for cargo).

[25] *See supra* note 16.

"committed substantial financial resources of its own to the venture" and therefore "stood to realize profits as part of the MINE group of affiliated companies participating in the joint venture with Guinea"; and, finally, Guinea's breach prevented Global from realizing those profits. Appellee's Br. 27-28.

We note at the outset the difficulty of discerning whether these factual allegations were found to be true by the District Court. Before the District Court, MINE did not offer such detailed facts to explain how the breach had a direct effect on Global, *see* J.A. 55, 248, and the "substantial activities" mentioned in the court's findings might well include both the preparation of the report and other SOTRAMAR-related actions.

But our difficulty with MINE's argument goes further than the possible absence of necessary findings in support of it. Under our reading of the third clause, even the scenario MINE offers on appeal does not constitute a "direct effect in the United States." This third clause, the House Report stated,

> would embrace commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965).

H.R. Rep. No. 94-1487, *supra*, at 19. Section 18, which is entitled "Jurisdiction to Prescribe with Respect to Effect within Territory," Restatement (Second) of Foreign Relations Law of the United States § 18 (1965), concerns the extent to which a state may enact rules of law proscribing conduct outside its territory to prevent the effects of that conduct within its territory. Although section 18 is therefore concerned with legislative rather than judicial action, Congress's clear reference has led some courts to find guidance in section 18's requirement that the effect

be "substantial" and "occur[] as a direct and foreseeable result of the conduct outside the territory."[26] *See Ohntrup v. Firearms Center Inc.*, 516 F. Supp. 1281, 1286 (E.D. Pa. 1981) (mem.); *Chicago Bridge & Iron Co. v. Islamic Republic of Iran*, 506 F. Supp. 981, 989 (N.D. Ill. 1980) (mem.); *Verlinden*, 488 F. Supp. at 1298; *Harris v. VAO Intourist*, 481 F. Supp. 1056 (E.D.N.Y. 1979) (mem.); *see also* Note, Direct Effect Jurisdiction Under the Foreign Sovereign Immunities Act of 1976, 13 N.Y. U. J. Int'l L. & P. 571, 609-10 (1981). *But see Texas Trading*, 647 F.2d at 311 & n.32; Note, Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause, 55 N.Y.U. L. Rev. 474, 502-05 (1980).

Another factor favoring recourse to section 18 lies in the scope of the FSIA's direct effect clause. The clause differs from the "direct effect" clauses found in many state long-arm statutes, because the former is explicitly intended to encompass effects resulting from commercial as well as tortious activities. *See Texas Trading*, 647 F.2d at 311; *VAO Intourist*, 481 F. Supp. at 1063-64; H.R. Rep. No. 94-1487, *supra*, at 19. The "substantial" and "direct and foreseeable" standards are likewise intended

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[26] Section 18 reads as follows:

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
>
> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
>
> (b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

to apply in commercial contexts. *See* Restatement (Second) of Foreign Relations Law of the United States, *supra*, § 18 comment f. In view of Congress's statement, and of the not dissimilar functions of section 18 and the third clause,[27] we consider this source of guidance a proper one.

The direct effect scenario offered by MINE falls short of satisfying these principles; we cannot conclude that the alleged injury to Global was a foreseeable result of any breach by Guinea. To explain this conclusion, it is important to note that the alleged injury to Global is not that Global went unrecompensed for services rendered to SOTRAMAR, but that Global lost anticipated profits. This alleged injury occurred only because Global became involved in the SOTRAMAR undertaking in such a way that it stood to realize some of the profits of that undertaking.

Applying the "direct effect" standard to this injury, and without attempting to state generally the circumstances when a commercial activity results in direct and foreseeable consequences, we think that an effect cannot be deemed direct if it occurs solely because of conduct not reasonably contemplated by the commercial activity.[28]

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[27] Although section 18 addresses legislative action, both section 18 and the third clause relate to when an action having an effect within the United States can trigger the exercise of authority by the United States. *See* Restatement (Second) of Foreign Relations Law of the United States, *supra*, § 18 comment b (§ 18 concerns "the question whether the conduct of [an] alien outside the territory had an effect within the territory of a type which justifies the state in prohibiting or regulating this conduct").

[28] Explaining the application of the foreseeability requirement in the commercial context, the comment to section 18 states:

> [T]he rule stated in this Clause does not require intent in the subjective sense, and will usually deal with conduct which was intended to produce the effect within the territory in the sense that those responsible for the con-

Only if involvement such as Global's was reasonably contemplated under the SOTRAMAR undertaking can we view as "direct" the injuries resulting from that involvement.

Neither the SOTRAMAR contract nor any other evidence in the record demonstrates that Global's profit-anticipating involvement was anything but the result of conduct by MINE and Global outside the agreed-upon bounds of the SOTRAMAR endeavor. Although the SOTRAMAR contract appears to have envisioned a broad market,[29] that goal would not, in itself, necessarily entail the substantial involvement of an American company hoping to realize profits from the venture. Neither does the second codicil's reference to "ships supplied by MINE/Global" show that Global could have been anticipated as becoming involved in such a way that it would suffer harm if SOTRAMAR never realized profits.

IV.

Under our reading of the FSIA, the record cannot sustain a finding that Guinea lost its sovereign immunity by virtue of waiver or of commercial activity. Because non-immunity is a condition to subject matter jurisdiction under the FSIA, we reverse the District Court's conclusion that it had subject matter jurisdiction to confirm the arbitration award.

It is so ordered.

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duct had reason to foresee that the effect within the territory would result from the conduct outside.

Restatement (Second) of Foreign Relations Law of the United States, *supra*, § 18 comment f.

[29] Article II of the contract stated in part:

> The COMPANY'S policy shall be to offer at all times and anywhere freight services at competitive international rates. However, for political reasons, [Guinea] reserves the right to exclude certain countries from the traffic of the COMPANY'S ships.

J.A. 209.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 81-1073 September Term, 1982

In the Matter of the Arbitration between
Maritime International Nominees Establishment

v.

The Republic of Guinea,
Appellant

Civil Action No. 78-00388

Argued 1-25-82
United States Court of Appeals
For the District of Columbia Circuit

Filed Jan 27 1983

George A. Fisher
Clerk

United States of America,
Intervenor

BEFORE: Robinson, Chief Judge; Edwards, Circuit Judge and McGowan, Senior Circuit Judge

ORDER

On consideration of appellee's petition for rehearing, it is

ORDERED by the Court, that the motion is denied, and it is

FURTHER ORDERED, by the Court, *sua sponte,* that the opinion for the Court filed November 12, 1982 in the above-entitled case is hereby amended in accordance with the attachment to this order.

Per Curiam

FOR THE COURT:

George A. Fisher,
Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

I. The first full paragraph on page 14 of the slip opinion (beginning "We reject MINE's suggested rationale..."); the next two paragraphs; and notes 11 and 12 are deleted. The following is inserted (so that after the insertion, the opinion resumes with the paragraph on page 16 beginning "Explaining this section...):

We are bound not to disturb a factual finding of the District Court unless it is clearly erroneous. *See* Fed. R. Civ. P. 52(a). In this case, the District Court's waiver holding was unquestionably based on the factual conclusion that the parties had contemplated an ICSID arbitration. First, as stated above, a central ingredient of that holding was the ICSID procedural rule stating that ICSID arbitrations shall normally take place at ICSID's seat in

Washington, D.C. From this rule the court inferred that the parties must have anticipated that arbitration would occur in the United States. *MINE v. Guinea,* 505 F. Supp. at 143. Obviously, the court would not have attached significance to the ICSID rules had it not understood the SOTRAMAR contract as contemplating an arbitration that would be subject to those rules – an ICSID arbitration. Second, the District Court described MINE's effort to have Guinea sign a revised submission to the jurisdiction of ICSID as an attempt to have the dispute heard "in arbitration *as contemplated by the contract." Id.* at 142 (emphasis added); *see also id.* at 142 n.2 (parties dispute whether MINE "could have proceeded to arbitration *in the manner contemplated by the contract* despite Guinea's refusal to participate [by refusing to sign the revised joint submission]") (emphasis added). Because exhibits filed by MINE itself in connection with its motion to confirm demand this very conclusion,[11] we cannot say that the District Court's factual finding was clearly erroneous.[12]

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[11]One exhibit, a copy of the "Demand for Arbitration" that MINE presented to the AAA, contains the following statement:

> Disputes between M.I.N.E. and Guinea arose out of and relating [sic] to the Agreement. in 1975, M.I.N.E. sought to obtrain from Guinea a proper and correct joint submission of their dispute to ICSID. Guinea, however, failed and refused to sign such a submission or to proceed with arbitration. The refusal by Guinea to execute a revised joint submission or otherwise cooperate with M.I.N.E.'s efforts made unavailable the method originally agreed upon by the parties for choosing arbitrators.

J.A. 103. A reference in another exhibit echoes the allegation that the failure to sign a submission to ICSID frustrated the method "originally agreed upon by the parties." J.A. 93 (affidavit of MINE's then-attorney). The clear import of these statements is that the parties contemplated an ICSID arbitration.

[12]We find an alternative reason to reject MINE's contention that the parties contemplated a non-ICSID arbitration in the fact that MINE consistently seems to have urged a contrary version of events on the

Thus, it is the District Court's waiver holding that we now evaluate – that the parties' agreement to submit future disputes to an ICSID arbitration can be deemed an implicit waiver of immunity within the meaning of section 1605(a)(1).

District Court. Establishing the proper context for an understanding of how MINE's position changed on appeal requires us to elaborate a few important details. As noted earlier, the contract contained a clause calling for arbitration of disputes by a panel of three arbitrators selected by the President of ICSID. J.A. 226; *id.* 229 (codicil). By its terms alone, this arbitration clause is indeed consistent with the argument MINE now offers for the first time on appeal: that the parties did not intend ICSID to conduct a formal arbitration, but only to have a hand in the selection of arbitrators. The language of the contract, however, is not the only evidence presented that was relevant to the parties' intended agreement to arbitrate. To begin with, the parties' subsequent conduct bears out that they had initially contemplated an ICSID arbitration: when the dispute ripened, both parties signed a form in which they consented to submit the dispute to the jurisdiction of ICSID. J.A. 319.

It is important to note why they found this later joint consent to be necessary. Under the ICSID Convention, ICSID jurisdiction can only be extended to controversies "which the parties to the dispute consent in writing to submit to [ICSID]." Convention art. 25(1). The written request must "contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings." *Id.* art. 36(2). MINE contended before the District Court that the later joint consent was necessary because "[t]he Contract did not contain language of consent and submission in ac[c]ordance with ICSID's suggested clauses, or otherwise." J.A. 252 n.9. That is, the contract did not "*evidence*[]" the consent of both parties to submit the dispute to ICSID's jurisdiction in a way that ICSID could recognize. *Id.* at 252 (emphasis added); *see id.* at 251 (contract "did not of *itself* constitute a mutual consent and submission to ICSID's jurisdiction") (emphasis added).

None of this denies, however, that MINE and Guinea had initially intended their arbitration clause to call for arbitration before ICSID. Guinea was not the only side to contend that this was both parties' intent all along. Time and time again MINE affirmed before the District Court that the original intent of the agreement was to have an ICSID arbitration. *See supra* note 11. Thus, even though the language of the contract was not technically sufficient to invoke ICSID procedures (a

II. In footnote 9, line 8, add after the words "collateral estoppel" but before the period", not res judicata". At the end of note 9, begin a new paragraph and add the following:

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fact that led the parties to submit additional evidence of their consent to ICSID's jurisdiction), the conduct of the parties after the dispute had ripened and MINE's own representations before the District Court make clear that the arbitration to which both parties intended initially to agree was an ICSID arbitration.

MINE tries to reconcile these earlier representations with the theory that the parties originally contemplated a non-ICSID arbitration by offering the following scenario: MINE "approached ICSID to determine how and when the President might select the three arbitrators"; ICSID personnel informed MINE that "such a procedure is unknown to the organization"; MINE "reluctantly concluded that the informal procedure contemplated by the agreement . . . could not be accomplished"; and only then did the parties sign the ICSID consent form. Appellee's Br. 55-56.

The initial problem with this scenario is that the ordering of events it portrays conflicts with the sworn affidavit submitted to the District Court by MINE's attorney. According to that document, MINE's attorney met with an ICSID official, not "to determine how and when the President might select the three arbitrators," as MINE now claims, but "in order to determine whether it was possible to submit the dispute between Petitioner and Respondent *to ICSID* for arbitration. . . ." J.A. 293 (emphasis added). This refutes MINE's present claim that the parties did not contemplate an ICSID arbitration until after the discouraging revelations of this meeting.

Even ignoring evidence discrediting MINE's newest version of events, however, we find no effort by MINE to prove or even to argue this scenario before the District Court. In an effort to show that the immunity provisions of the ICSID Convention never became applicable, MINE did reiterate near the end of oral argument that the contractual arbitration clause alone never amounted to a consent sufficient to trigger ICSID jurisdiction. Transcript of January 8, 1981, Hearing, at 25 (Immunity under the Convention "presupposes that ICSID has jurisdiction and the parties have duly consented to ICSID. [Yet t]he parties did not consent to ICSID. . . . the agreement merely says that the president of ICSID would choose the arbitrator."); *id.* at 25-26 (The vice-president and general counsel of ICSID "did not consider that [contract] adequate consent. There has been no adequate consent for three years."). But we find nothing in any of MINE's

Moreover, we would almost certainly reach the same result were we to apply the doctrine of res judicata by somehow viewing Guinea's raising of the jurisdictional issue in the confirmation proceeding as a collateral attack on the holding of the proceeding to compel. As the Supreme Court recently reaffirmed, "A defendant is always free to ignore the judicial proceedings, risk a default judgment and then challenge that judgment on jurisdictional grounds in a collateral proceeding." Insurance Corp. v. Compagnie des Bauxites de Guinee, 102 S. Ct. 2099, 2106 (1982). Even if this rule preserves only *personal*-jurisdiction attacks, it would preserve Guinea's immunity defense, which addresses both personal and subject matter jurisdiction.

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arguments that departs from the view it espoused until this present appeal: that the parties intended an ICSID arbitration when they drafted the contract; that the fact that the arbitration clause provided explicitly only for the President of ICSID to choose arbitrators rendered it technically insufficient to get ICSID to act; that, in an effort to carry out this original intent, the parties attempted to submit a technically-correct consent to ICSID; and that for one reason or another these efforts never actually brought the dispute within ICSID's jurisdiction.

Therefore, even had the District Court not found that the parties initially agreed to an ICSID arbitration, we would have ample reason to reject MINE's contrary contention on appeal. At best the contention rests on a factual premise that was not developed before the District Court, *see* Carr v. District of Columbia, 543 F.2d 917, 921-22 (D.C. Cir. 1976), and at worst it is contradicted by the factual record that the parties did develop.

No. 82-1754

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN THE MATTER OF THE ARBITRATION BETWEEN

MARITIME INTERNATIONAL NOMINEES ESTABLISHMENT,
Petitioner,

v.

THE REPUBLIC OF GUINEA,
Respondent,

THE UNITED STATES OF AMERICA,
Intervenor.

On Petition for Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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June 2, 1983

QUESTIONS PRESENTED

1. Did the court of appeals erroneously decide that the doctrine of collateral estoppel had no preclusive effect on litigating the issue of subject matter jurisdiction, where preclusive effect was not briefed or argued by the parties below, the parties never actually litigated subject matter jurisdiction in the prior proceeding, and the court of appeals' ruling is in any event unassailable because the identical litigation was available and applied to the issue of personal jurisdiction?

2. Did the court of appeals err in declining to imply a waiver of foreign sovereign immunity from the foreign sovereign's binding and exclusive submission to the jurisdiction of an international arbitral tribunal, where the facts asserted in support of waiver were contrary to findings made by the district court and affirmed by the court of appeals, were contrary to representations made to the district court, and were held by the court of appeals to be foreclosed to petitioner by the doctrine of estoppel?

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TABLE OF CASES AND AUTHORITIES

IN THE

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OCTOBER TERM, 1982

No. 82-1754

IN THE MATTER OF THE ARBITRATION BETWEEN

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The final opinion of the United States Court of Appeals for the District of Columbia Circuit of November 12, 1982, as amended on denial of rehearing on January 27, 1983, has now been reported at 693 F.2d 1094. The bound volume of that reporter containing the amended opinion was published after filing of the petition for writ of certiorari in this case. The opinion as amended and reported is reproduced in the Appendix hereto.

STATEMENT OF THE CASE

This is a dispute over an arbitration agreement contained in a contract between the parties. Respondent the Republic of Guinea ("Guinea") is a foreign sovereign state. Petitioner Maritime International Nominees Establishment ("MINE") is a Liechtenstein corporation. The arbitration clause, contained in a contract creating a joint-venture shipping company called "Sotramar," provided for final and binding arbitration to be conducted by three arbitrators chosen by the President of the International Centre for Settlement of Investment Disputes ("ICSID"), an international organization located in Washington, D.C.[1] Appendix ("App.") 3a-4a.

For reasons that are disputed by the parties, Sotramar never became a viable commercial entity. In 1975, the parties invoked the arbitration clause and executed a formal consent form submitting the dispute to the exclusive jurisdiction of ICSID. App. 4a. Although MINE had promised Guinea's designated representative that it would file the form with ICSID and take the necessary steps to initiate the arbitral process, Guinea's representative received no further communication from MINE until November 1980. In the meantime, MINE never filed the consent with ICSID. It made a unilateral determination that the consent was "deficient," and allegedly mailed to Guinea a "revised" consent form that Guinea never received. *See* App. 4a-5a. ICSID files contain no record of any arbitration request in connection with the contract. App. 5a.

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[1] ICSID was created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (the "ICSID Convention"). It operates under the auspices of the World Bank. Its purpose is to provide a neutral international forum for settlement of differences arising from investment agreements between states and private party investors residing in other countries. In order to qualify for ICSID arbitration, the state must be a signatory to the ICSID Convention. *Id.* art. 25. The private investor must be a national of another state signatory to the Convention. *Id.* When two eligible parties consent to submit a dispute to ICSID, its jurisdiction becomes exclusive. *Id.* art. 26. The consent is irrevocable and can be enforced through award in ex parte arbitration proceedings. *Id.* art. 36. A default award is binding on the parties. *Id.* arts. 45, 53. *See generally* App. 4a, 17a-18a.

In 1978, MINE filed in the district court a petition to compel arbitration before the American Arbitration Association ("AAA"). It alleged that Guinea's failure to execute the revised consent had frustrated the parties' intention to arbitrate before ICSID. The petition asserted jurisdiction generally under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4, and the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611. Guinea did not appear. The district court granted the petition in a brief order. App. 6a; *see* Joint Appendix ("J.A.") 48-49. An ex parte AAA arbitration duly took place. Guinea did not appear. The arbitral panel awarded MINE damages for breach of contract in excess of $25,000,000. App. 7a.

In August 1980, MINE returned to the district court to obtain confirmation of the AAA award, thus initiating this action. Guinea entered an appearance for the first time[2] to challenge the personal and subject matter jurisdiction of the court under the FSIA. The district court on January 12, 1981, entered an order and judgment confirming the arbitral award and denying Guinea's motion to dismiss. It held, on the basis of affidavits and exhibits submitted by the parties, that Guinea had waived sovereign immunity by consenting to ICSID arbitration and had engaged in commercial activities having a nexus with the United States under section 1605(a) of the FSIA. *See* App. 7a-9a.

Guinea appealed. It argued, *inter alia,* that under the exclusivity and immunity provisions of the ICSID Convention, consent to ICSID's jurisdiction could not constitute a waiver of immunity from national process. It also urged that the factual record in the court below did not evidence sufficient commercial contact with the United States to sustain jurisdiction under the FSIA. App. 9a-10a. MINE asserted for the first time on appeal, contrary to its representations to the district court, that the parties had in fact contemplated informal, ad hoc arbitration rather than formal ICSID arbitration. App. 14a-17a n.12.

[2] Guinea's representative had not received notice of any of the prior proceedings. He learned of this proceeding purely by chance. Guinea argued in both courts below that service of process was invalid. App. 8a, 9a.

The court of appeals reversed. With respect to waiver, it held (1) that MINE's new scenario concerning ad hoc arbitration had not been presented to the district court, was contrary to MINE's representations below, and could not be considered on appeal, App. 13a-17a; and (2) that in order to constitute a waiver of immunity, an agreement to arbitrate in another country must contemplate a role for that country's courts to compel arbitration. Because MINE had based its claim to AAA arbitration upon the premise that U.S. courts could *not* compel such arbitration under the parties' agreement, MINE was estopped from asserting waiver. App. 19a-20a. The court then undertook an exhaustive review of the factual record developed in the district court, and held that Guinea's contacts with the United States were too transitory and insubstantial to sustain jurisdiction under the "commercial activity" provisions of the FSIA, 28 U.S.C. § 1605(a)(2). App. 20a-37a. Under the statutory structure of the FSIA, the existence of sovereign immunity deprived the court of personal and subject matter jurisdiction. App. 11a, 37a.

In denying MINE's subsequent petition for rehearing, the court of appeals extensively amended its opinion to rebut the very arguments now presented to this Court. First, MINE asserted that the court had erroneously rejected its theory that the parties contemplated ad hoc arbitration, because it had actually raised that theory before the district court. The court of appeals' amendment inserted specific quotations from the record (including counsel's sworn testimony) directly contradicting both the revised version itself and its presentation to the court below. App. 14a 14a-17a n.12.

Second, MINE seized upon a passing footnote in the original opinion to raise for the first time on rehearing the issue of collateral estoppel. The court had originally held:

> MINE has not argued that the District Court's finding that it had jurisdiction under the FSIA in the earlier section 4 proceeding to compel bars Guinea from questioning the District Court's exercise of jurisdiction in the section 9 proceeding to confirm now under review. . . . [Collateral estoppel] requires

> that even issues less basic than jurisdiction be fully litigated before they are preclusively established .... Guinea did not appear in the first proceeding, so the issue was not fully litigated and may be raised at this time.

App. 10a n.9 (citations omitted). Despite its utter failure to invoke the estoppel defense previously, MINE advanced for the first time on rehearing the proposition that the district court's prior order compelling arbitration had collateral estoppel effect as to subject matter jurisdiction in this action. The court responded:

> As the Supreme Court recently reaffirmed, "A defendant is always free to ignore the judicial proceedings, risk a default judgment and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Insurance Corp. v. Compagnie des Bauxites de Guinee,* ____ U.S. ____, 102 S. Ct. 2099, 2106, 72 L. Ed. 2d 492 (1982). Even if this rule preserves only *personal*-jurisdiction attacks, it would preserve Guinea's immunity defense, which addresses both personal and subject matter jurisdiction.

Id. (emphasis in original).

REASONS FOR DENYING THE PETITION

I. COLLATERAL ESTOPPEL IS NOT AN ISSUE IN THIS ACTION.

Questions that the parties have failed to brief and argue in the courts below cannot be presented to this Court on petition for writ of certiorari. *Delta Air Lines, Inc. v. August,* 450 U.S. 346, 362 (1981); *Miree v. De Kalb County,* 433 U.S. 25, 33-34 (1977); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 397-98 (1971). In asking the Court to determine the preclusive effect of the district court's first order compelling arbitration, MINE here seeks review of an issue raised for the first time on petition for rehearing of the decision of the court of appeals.

As that court's opinion makes clear, the parties never briefed or argued that issue on the merits in the court of appeals or the district court. *See* App. 10a n.9, *quoted at* page 6 *supra*.[3] The defense was available to MINE from the moment Guinea filed its motion to dismiss for lack of jurisdiction. On the contrary, however, MINE's response to that motion asserted precisely the opposite proposition—that the district court's prior order compelling arbitration was *not* a final order for jurisdictional purposes. *See* Memorandum in Reply to Motion to Dismiss, J.A. 254-55 ("The Respondent has argued that the court's prior order under Section 4 compelling arbitration was a final order, and that enforcement under Section 9 . . . constitutes a new proceeding, and that the court does not retain jurisdiction from the Petitioner's previous action. The fact that an order directing arbitration is for certain purposes considered a "final" decision, does *not* mean that this court does not retain jurisdiction to confirm an award and reduce it to judgment." (emphasis in original)). *Cf.* Fed. R. Civ. P. 8(c), 12(g) (failure affirmatively to plead estoppel and res judicata as defenses constitutes waiver).[4]

Even if the question had been properly briefed and argued below, the manifest correctness of the court of appeals' statement of the law renders review entirely unnecessary. As MINE's own authority states, *see Insurance Corp. v. Compagnie*

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[3] Contrary to MINE's assertion in its petition for rehearing, *see* Petition for Rehearing at 7-8 n.2, MINE never argued this issue in the court of appeals. The passages in question appear in MINE's Reply Brief to Brief for the United States of America as Intervenor and Suggestion of Interest, under two headings: "The government's proposal concerning abstention cannot be applied in the circumstances of this dispute because barred by *res judicata* principles," and "The government's proposal ignores Guinea's waiver of recourse to ICSID." Neither discussion mentions preclusion in connection with subject matter jurisdiction. *Id.* at 20-26.

[4] Nor has any material change in the law occurred to excuse MINE's tardiness. While the petition for rehearing emphasized this Court's issuance of its decision in *Insurance Corp. v. Compagnie des Bauxites de Guinee*, 102 S. Ct. 2099 (1982), after oral argument in the court of appeals, MINE itself classifies the footnote on which it relies in that case as routinely reaffirming "an unbroken line of decisions" dating at least from 1940. Petition for Writ of Certiorari ("Pet.") at 11; *see* 102 S. Ct. at 2104 n.9. Under these circumstances, MINE cannot now raise the issue of collateral estoppel before this Court.

des Bauxites de Guinee, 102 S. Ct. 2099, 2104 n.9 (1982), the bare opportunity to litigate a matter in a prior action will preclude relitigation in a later action only as to matters that are res judicata between the parties. Where, as here, the claim in the subsequent action is different, res judicata does not apply. Collateral estoppel does. It cannot operate except as to issues actually litigated and decided in the prior action. As this Court has stated,

> [W]here the second cause of action between the same parties is upon a different cause or demand. . . , the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' *Cromwell v. County of Sac,* [94 U.S. 351], 353. . . . [M]atters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel.

Commissioner v. Sunnen, 333 U.S. 591, 597-98 (1948) (citations omitted). *Accord, Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 579, 593 (1974); *see* 1B J. Moore & T. Currier, *Moore's Federal Practice* ¶ 0.405 (2d ed. 1982).

The claim in this action to confirm an arbitration award under section 9 of the FAA is obviously distinct from the claim in MINE's previous action to compel arbitration under section 4. A section 4 proceeding adjudicates the existence of the agreement to arbitrate and the failure to comply therewith, 9 U.S.C. § 4, while a section 9 proceeding adjudicates the validity of the arbitral award and the regularity of the arbitral procedure. 9 U.S.C. §§ 9, 10. Nor was the issue of subject matter jurisdiction actually litigated in the prior action. As the court of appeals noted, App. 10a n.9, Guinea's non-appearance alone precludes the application of collateral estoppel. Neither MINE nor the district court raised the issue. MINE's petition contained a bare allegation of jurisdiction under the FSIA, without

any discussion of specific provisions that might be applicable or specific facts on which jurisdiction might rest. *See* J.A. 6-10. The district court's order nowhere mentioned the existence of subject matter or personal jurisdiction. It merely noted that service of a "Notice of Motion" had taken place under the FSIA. J.A. 48.[5]

Even if MINE were correct in raising the order to compel arbitration as a bar to relitigation of subject matter jurisdiction, carrying the point would avail it nothing. The court would still lack personal jurisdiction for exactly the same reason it lacks subject matter jurisdiction—Guinea has sovereign immunity. MINE does not dispute Guinea's entitlement to challenge personal jurisdiction in the proceeding to confirm the award. *See* Pet. at 13; *Insurance Corp. v. Compagnie des Bauxites de Guinee,* 102 S. Ct. at 2106. On the assumption that subject matter jurisdiction could somehow be established through preclusion, dismissal would nevertheless be required for lack of personal jurisdiction.[6]

As the court of appeals explained, App. 11a-12a, both personal and subject matter jurisdiction under the FSIA are contingent upon a finding of non-immunity under the substantive principles of sovereign immunity embodied in 28 U.S.C. §§ 1605-1607: "a lack of subject matter jurisdiction also deprives the court of personal jurisdiction under the Act." App. 11a. As this Court has recently stated in reasoning virtually identical to that of the court of appeals:

> The District Court dismissed "for lack of personal jurisdiction." Under the Act, however, both statutory

[5] This seems at odds with 28 U.S.C. § 1608(e) ("No judgment by default shall be entered by a court of the United States . . . against a foreign state . . . unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.").

[6] MINE's assertion that "subject matter jurisdiction . . . was the sole basis of the Court of Appeals' reversal of the order to confirm the award," Pet. at 13, reads the court's opinion too narrowly. In addition to the passage quoted at the end of the Statement of the Case, Judge McGowan explicitly stated: "Whether subject matter and personal jurisdiction existed under the Act, then, turns in the first instance on whether Guinea was entitled to immunity under sections 1605 and 1607." App. 11a-12a.

> subject matter jurisdiction (otherwise known as "competence") and personal jurisdiction turn on application of the substantive provisions of the Act. Under § 1330(a), federal district courts are provided subject matter jurisdiction if a foreign state is "not entitled to immunity either under sections 1605-1607 . . . or under any applicable international agreement;" § 1330(b) provides personal jurisdiction wherever subject matter jurisdiction exists under subsection (a) and service of process has been made under § 1608 of the Act. Thus, if none of the exceptions to sovereign immunity set forth in the Act applies, the District Court lacks both statutory subject matter jurisdiction and personal jurisdiction. The District Court's conclusion that none of the exceptions to the Act applied therefore signified an absence of both competence and personal jurisdiction.

Verlinden B.V. v. Central Bank of Nigeria, No. 81-920, slip op. at 4 n.5 (U.S. May 23, 1983).

II. THE COURT OF APPEALS CORRECTLY DECIDED THE SIGNIFICANCE OF THE QUESTION WHETHER ICSID ARBITRATION WAS AVAILABLE.

The court of appeals never decided the question "[w]hether a foreign state which agrees to arbitrate disputes with a private party in the United States, before a panel of arbitrators to be selected by an international organization, can be compelled by a district court to arbitrate before a substitute panel of arbitrators . . . where the arbitration as originally stipulated cannot be carried out." Pet. i. The court held that the district court lacked jurisdiction under the FSIA because Guinea enjoys sovereign immunity. It did not decide anything remotely resembling the question MINE seeks to present. MINE's petition impermissibly asks this Court to render an advisory opinion on an abstract question never decided in the

court of appeals.[7] *E.g., Princeton University v. Schmid,* 455 U.S. 100, 102 (1982); *Dunn v. United States,* 442 U.S. 100, 113 n.14 (1979).

Nor did the court of appeals decide, in holding that the parties' arbitration agreement did not constitute an agreement to arbitrate in another country for purposes of implicit waiver of sovereign immunity, an "important and recurring" question of international law. Pet. 19. The court simply held that on the facts developed below, MINE was estopped to assert any facts supporting the inference of waiver:

> MINE has insisted, and is estopped from denying, that United States courts were powerless to compel an ICSID arbitration under this particular arbitration agreement. . . . MINE contended that an ICSID arbitration was unavailable in order to induce the District Court to go beyond the express terms of the arbitration clause. . . . Given that this point is now established for purposes of this litigation, we have no trouble holding that this particular ICSID agreement was not an agreement "to arbitration in another country. . . ."
>
> * * * *
>
> [We] decide that this ICSID agreement did not contemplate the involvement of domestic courts before the enforcement stage only because MINE cannot contend otherwise in this litigation.

App. 19a, 18a n.14. Strictly limiting its holding to this factual basis, the court expressly refused to decide any more general legal issues. App. 18a-19a.[8] The holding as limited is both manifestly correct and singularly insignificant.

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[7] MINE in one breath has relied on the finality of the prior order compelling arbitration as the basis for collateral estoppel, and in the next has asked the Court to consider an issue properly raised only on direct review of that final order—*e.g.*, whether Guinea "can be compelled . . . to arbitrate."

[8] MINE's suggestion that a conflict exists between this case and decisions in other circuits concerning the permissible scope of implicit waiver, *see* Pet. 15 n.9, is without merit in light of the court's explicit statement that it did not decide the issue whether an agreement to arbitrate in a third country would waive immunity in U.S. courts. App. 19a n.15.

While MINE claims that ICSID jurisdiction is lacking because its nationality is wrong, Pet. 16-17,[9] it has never bothered to test that assertion before the only tribunal competent to decide the issue. MINE has never initiated any formal contact with ICSID of any kind. App. 5a. And, in any event, in a context where MINE does not even question the court of appeals' ruling that the dispute lacked sufficient commercial contacts with the United States to meet that test of jurisdiction under the FSIA, it seems particularly inappropriate for MINE to complain to this Court, Pet. 17, that lack of a U.S. remedy means it "would be deprived of all redress."

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[9] While ICSID is the only body that can conclusively decide this issue, available authority indicates that this proposition is open to serious doubt. According to Aron Broches, former Secretary General of ICSID, "any stipulation of nationality made in connection with a conciliation or arbitration clause which is based on a reasonable criterion should be accepted." Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 1972[II] Recueil des Cours 333, 360. The parties' joint consent in fact contained a stipulation that MINE was Swiss, J.A. 45.

CONCLUSION

For the foregoing reasons, respondent the Republic of Guinea respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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June 2, 1983

APPENDIX

693 FEDERAL REPORTER, 2d SERIES 1094

IN THE

MATTER OF THE ARBITRATION BETWEEN

MARITIME INTERNATIONAL
NOMINEES ESTABLISHMENT

v.

THE REPUBLIC OF GUINEA, *Appellant*,

UNITED STATES OF AMERICA, *Intervenor*.

No. 81-1073.

**UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT**

Argued Jan. 25, 1982.

Decided Nov. 12, 1982.

As Amended on Denial of Rehearing
Jan. 27, 1983.

[**1095**] Appeal from the United States District Court for the District of Columbia (D.C. Civil Action No. 78-00388).

Stephen N. Shulman, with whom Mark C. Ellenberg and Mary M. Kearney, Washington, D.C., were on the brief, for appellant.

David Maurice Cohen, Atty., Dept. of Justice, with whom Charles F.C. Ruff, U.S. Atty. at the time the brief was filed, William Kanter, Linda M. Cole, and James G. Hergen, Attys.,

Dept. of Justice, and James H. Michel and Jonathan B. Schwartz, Attys., Dept. of State, Washington, D.C., were on the brief, for intervenor.

Mattaniah Eytan, San Francisco, Cal., with whom Julius Kaplan and James W. Schroeder, Washington, D.C., were on the brief, for appellee.

Before ROBINSON, Chief Judge, EDWARDS, Circuit Judge, and McGOWAN, Senior Circuit Judge.

Opinion for the Court filed by Senior Circuit Judge McGOWAN.

McGOWAN, Senior Circuit Judge:

The Republic of Guinea ("Guinea") appeals from, and raises numerous challenges to, the District Court's order confirming an arbitration award rendered by the American Arbitration Association in favor of Marine [sic] International Nominees Establishment ("MINE"). The District Court lacked subject matter jurisdiction, Guinea claims, because Guinea was immune under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub.L. No. 94-583, 90 Stat. 2891; because the arbitration clause contained in the parties' contract precluded the exercise of jurisdiction under the FSIA; and because the FSIA does not, and cannot constitutionally be read to, confer subject matter jurisdiction over suits between foreign plaintiffs and foreign states. Guinea also contends that MINE's service of process upon it did not meet the requirements of the FSIA and that the arbitration award itself was defective and unenforceable.

We reach only the first of these arguments, because we conclude that Guinea was immune under the FSIA and therefore that the court lacked subject matter jurisdiction to confirm the award. Accordingly, we reverse.

I

The following facts, unless indicated otherwise, are not disputed by the parties. The Republic of Guinea is a foreign sovereign state, and MINE is a Liechtenstein corporation. On August 19, 1971, Guinea and MINE[1] entered into a contract providing for the creation of a "mixed economy company" that became known as "SOTRAMAR." J.A. 205-27.[2] The purpose of the contract, as seen by both MINE and Guinea, was to establish and provide shipping services to transport Guinean bauxite to foreign markets. Appellant's Br. 4-5; Appellee's Br. 4; J.A. 209. The contract detailed the obligations of the parties and included provisions concerning capital and profits, operation, management, labor, professional training, and tax treatment. One "special provision" stated that the parties would make a market study and set up a technical and economic dossier, and that "mixed technical commissions" would study such matters as organization and finances. All these studies were to take place before SOTRAMAR was formed. J.A. 225. Although Guinean law was to be "applicable" to the contract, the contract stated that the "law between the parties" was the contract itself, and therefore that "Guinean laws shall be used for the interpretation and the implementation of this Agreement only accessorily and only in the case where the Agree-[**1096**]ment would leave a problem unsolved." J.A. 222-23.

The contract also contained several provisions relating to the settlement of disputes. When disagreements arose, the parties were first to attempt informal conciliation. If that effort failed, the parties were then to submit the conflict to arbitration by means of the method described in the contract—a panel of three arbitrators "selected by the President of CIRDI at the joint request of the parties or, failing this, at the request of the most diligent party." J.A. 226. "CIRDI" is the French acronym for the International Centre for Settlement of Investment

[1] The signatories to the contract were Guinea and the Inter Maritime Bank, which acted "in the name and on behalf of" MINE. Joint Appendix ("J.A.") 207.

[2] "SOTRAMAR" is an acronym for the "Societe Mixte de Transports Maritimes," Appellant's Brief ("Br.") 4, or the "Societe Guineenne de Transports Maritimes," Appellee's Br. 5.

Disputes. A codicil to the contract stated that the arbitrators would be chosen by the "President of the International Court of Settlement of International Disputes [sic] in Washington (CIRDI)." J.A. 229.

Although we will discuss later the parties' disagreement over the exact meaning of these arbitration provisions, a brief description of the International Centre for Settlement of Investment Disputes ("ICSID") should be helpful at this point. ICSID was established by an international agreement, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 ("the Convention"), to which the United States and more than seventy-five foreign countries are parties. Although ICSID is seated in Washington, D.C., its purpose is to provide an international conciliation and arbitration forum. Convention art. 1(2). An ICSID arbitration is not undertaken by ICSID itself, but by arbitral tribunals constituted in accordance with the provisions of the Convention and subject to rules promulgated by ICSID. When two eligible parties consent to submit a dispute to an ICSID arbitration, that course is deemed to be their sole remedy unless they specify otherwise. *Id.* art. 26. Following the execution of a valid consent, either party may invoke the ICSID arbitration process, even if the other party refuses to participate. *Id.* art. 36. An ICSID award, even when rendered in such a default proceeding, is final and binding on the parties. *Id.* arts. 45, 53.

Although some SOTRAMAR-related activities took place after the contract was signed, SOTRAMAR never became an operating commercial entity. A rift developed between the parties, and in January 1975 the parties signed a form purporting to present their differences to an ICSID arbitration. Appellant's Br. 7; Appellee's Br. 56-57; J.A. 46.

What took place next is disputed. By Guinea's account, MINE agreed to file with ICSID the consent and a formal arbitration request; MINE took no such action but instead determined that the consent form was technically deficient; MINE mailed a purportedly correct revised form to Guinea;

Guinea never received this form; and MINE made no effort to determine whether the revised form had reached Guinea. Appellant's Br. 7. MINE states that it perceived a deficiency in the first consent form and "urged" Guinea to execute a new form, but that Guinea then "broke off all relations and refused to communicate further with MINE." Appellee's Br. 6. ICSID files contain no record of any request for arbitration in connection with the SOTRAMAR contract. J.A. 236 (letter from Acting Secretary-General of ICSID to counsel for Guinea (Dec. 8, 1980), Exhibit 7 to Guinea's Motion to Dismiss and Opposition to Motion to Confirm Arbitration Award and Enter Judgment).

On January 20, 1978—some three years after the first consent form was signed—MINE filed, in federal district court, a petition to compel arbitration under section 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4 (1976), asserting subject matter jurisdiction under the FSIA and the FAA. J.A. 6. In essence, section 4 of the FAA empowers a federal district court to order arbitration to proceed in accordance with the terms of an arbitration agreement when adequate findings are made that an agreement did exist and that a default under the agreement did occur. Another relevant section of the FAA, section 5, 9 U.S.C. § 5 (1976), sets forth the circumstances [**1097**] when a court is additionally authorized to order arbitration before an arbitrator or arbitrators not named in the agreement. One such instance occurs when a party "fail[s] to avail himself" of the agreed-upon method for naming arbitrators. *Id.*

Drawing on these provisions, the petition to compel set forth a series of allegations, with exhibits attached, to demonstrate that the court should order the parties to proceed to arbitration before the American Arbitration Association ("AAA"). In essential part, MINE maintained that it had prepared the joint consent form "in accordance with the terms" of the SOTRAMAR contract, that it had then prepared a corrected consent form and had mailed it to Guinea, and that Guinea had "failed and refused either to sign the revised

submission or to proceed with arbitration." J.A. 8-9. As a result, MINE continued, it could not initiate an ICSID arbitration. J.A. 9.

Because in MINE's view these facts demonstrated that Guinea intended not to abide by the agreed-upon arbitration method, *id.,* the petition went on to assert that no longer was that method available. *Id.* An order to compel arbitration was therefore proper, "since procedures are available [under section 5] to have a court appoint an arbitrator for the non-cooperating party." J.A. 10.

MINE served process upon Guinea by mailing, via registered mail, copies of the relevant documents to the Ministry of Foreign Affairs in Conakry, Guinea. MINE also sent the same documents by certified mail to the Embassy of Guinea in Washington, D.C. J.A. 47. Guinea did not respond to these documents.

The District Court heard argument on the petition on June 15, 1978; Guinea made no appearance. That same day, the court entered an order granting MINE's petition and ordering arbitration before the AAA and in accordance with the rules of the AAA. J.A. 48. The order set forth the court's conclusions that service had been proper under the FSIA, that the existence of an arbitration agreement and the failure to comply therewith were not in issue, and that Guinea's failure to avail itself of the agreed-upon arbitration method had frustrated the intent of that agreement. The order did not specifically state the basis for the court's subject matter jurisdiction. The clerk of the District Court served copies of the order, by registered mail, upon the Ministry of Foreign Affairs in Guinea and upon the Embassy of Guinea in Washington, D.C. J.A. 50.

MINE then filed, on September 5, 1978, a demand for arbitration before the AAA, J.A. 102, serving notice of the demand upon Guinea by the same method it had followed earlier. J.A. 110. The demand alleged several breaches of the SOTRAMAR agreement, including Guinea's failure to give to SOTRAMAR's management the necessary authority to conclude contracts for the carriage of bauxite and the provision of

services, as well as Guinea's grant to another company of the bauxite rights reserved to MINE. J.A. 105-06. Arbitration hearings took place on February 5, 6, and 7, 1979; May 25, 1979; and April 14, 1980. J.A. 95-100 (affidavit of James W. Schroeder, Exhibit C to MINE's Motion to Confirm Arbitration Award and Enter Judgment). During these proceedings, the AAA served upon Guinea various documents concerning the arbitration, *id.;* Guinea did not appear or file any response. On June 9, 1980, the arbitrators rendered an award in excess of $25 million, which primarily represented compensatory damages for breach of contract. J.A. 86-87.

MINE then returned to the District Court, filing on August 22, 1980, a motion to confirm and enter judgment on the arbitration award under section 9 of the FAA, 9 U.S.C. § 9 (1976). J.A. 51. Accompanying the motion was a memorandum of points and authorities, with exhibits attached. Once again, MINE served process upon Guinea by the method followed earlier.

On December 9, 1980, Guinea entered the proceedings for the first time, filing a motion to dismiss for lack of subject matter jurisdiction. Record ("R.") 21. Guinea also filed a memorandum of points and authorities in support of the motion to dismiss and [**1098**] in opposition to MINE's motion to confirm. J.A. 125. In brief outline, the memorandum argued that neither the FAA, the commercial rules of the AAA, nor the FSIA provided the court with subject matter jurisdiction to entertain either MINE's earlier petition to compel or the motion to confirm. J.A. 134-40. The memorandum also contended that the court's earlier order to compel rested on an incorrect premise, because an ICSID arbitration had indeed been available.

MINE then filed, on January 5, 1980, a memorandum in reply to Guinea's motion to dismiss and in further support of its own motion to confirm. J.A. 237. Attached to the document were supporting exhibits.

The court heard oral argument from the parties on January 8, 1981, focusing attention on the issue of subject matter jurisdiction under the FSIA.[3] On January 12, 1981, the court entered an order denying Guinea's motion to dismiss, granting MINE's motion to confirm, and entering judgment on the award. R.25.[4] The court also issued a four-page memorandum opinion primarily discussing its conclusion that it had subject matter jurisdiction under the FSIA. *In re Arbitration between Maritime International Nominees Establishment v. Republic of Guinea,* 505 F. Supp. 141 (D.D.C. 1981) (mem. op.) [*"MINE v. Guinea"*].

On January 16, 1981, Guinea filed a motion for a new trial or, in the alternative, for relief from judgment, on the ground that newly discovered evidence showed that MINE's service of process had been invalid under the FSIA. J.A. 305. Also on that day, Guinea moved for a stay of the judgment until the District Court had ruled on the motion for a new trial, or, in the alternative, for shortening the time for MINE to respond to Guinea's motion for a new trial. R. 28. That same day, MINE submitted an affidavit in opposition to both motions. J.A. 322.[5] On January 21, 1981, the District Court entered an order denying both of Guinea's motions but allowing Guinea five days to seek from this court a stay pending appeal. J.A. 325. Also on January 21, Guinea filed a notice of appeal from the January 12 order confirming the arbitration award.[6] The next

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[3] At the outset of the hearing, the court stated, "The issue that concerns the Court the most and the one that seems to me that you ought to focus your arguments on is, basically, the jurisdictional question." Transcript of January 8, 1981, Hearing, at 3.

[4] On March 11, 1981, upon motion of both parties, the District Court corrected this with respect to the amount of the award. J.A. 297.

[5] MINE sought to make a fuller reply to the contentions advanced in Guinea's motions by filing on January 23, 1981, a motion for leave to complete the record. J.A. 326. The District Court granted the motion on February 10, 1981. R. 34.

[6] The same day, Guinea filed with the District Court a motion for a stay pending appeal. R. 30.

day, Guinea moved this court for a stay pending appeal; on January 23 that motion was granted and execution of judgment was stayed until a decision on the merits or further order of the court.[7]

II

Guinea's challenges to the confirmation order fall into three categories.[8] First, it claims that the District Court lacked subject matter jurisdiction because: (1) the court erred in ruling that Guinea was not immune under the FSIA; (2) even assuming non-immunity, the FSIA does not purport to confer subject matter jurisdiction over suits between foreign plaintiffs and foreign states; (3) the FSIA would be unconstitutional if read to confer such juris-[**1099**]diction; and (4) the signing by both parties of the first ICSID consent form committed them to an ICSID arbitration and therefore deprived the District Court of jurisdiction.

Second, Guinea claims that MINE's service of process upon it was inadequate under the FSIA, and therefore that the District Court lacked personal jurisdiction under the FSIA. Third, Guinea attacks the arbitration award itself, contending (1) that the arbitrators exceeded their authority by disregarding the liquidated damages provision of the contract, (2) that the arbitrators lacked power to delegate the task of

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[7] On September 18, 1981, this court entered an order granting the United States leave to intervene pursuant to 28 U.S.C. § 2403 (1976), and allowing the United States to file a suggestion of interest. In addition to the regular cycle of briefing in this case, therefore, we have received a Brief for the United States as Intervenor and Suggestion of Interest, and briefs from MINE and Guinea in reply to the United States's brief.

[8] Although Guinea directs some of its arguments both to the order to compel and the order to confirm, *see, e.g.*, Appellant's Br. 25, it is clear that the only order on review before us is the order to confirm. An order to compel arbitration issued in an independent proceeding under the FAA is a final and appealable judgment. *See Chatham Shipping Co. v. Fertex Steamship Corp.*, 352 F.2d 291 (2d Cir. 1965); 9 Moore's Federal Practice ¶ 110.20[4.-1] (2d ed. 1982). *Cf. Goodall-Sanford, Inc. v. United Textile Workers*, 353 U.S. 550, 77 S.Ct. 920, 1 L.Ed.2d 1031 (1957) (order directing arbitration under section 301(a) of the Taft-Hartley Act, 29 U.S.C. § 185(a) (1976), is appealable as a final judgment). Guinea cannot now, by way of appealing the confirmation order, obtain review of the earlier order to compel.

damage calculation to an accounting firm, (3) that the award was based on evidence outside the record, and (4) that MINE obtained an AAA arbitration by misrepresenting before the District Court the availability of an ICSID arbitration.

Because we hold that the court lacked subject matter jurisdiction to confirm the arbitration award, we need not address the service of process issue or the validity *vel non* of the arbitration award itself. And, because this jurisdictional holding rests on our conclusion that the condition for subject matter jurisdiction under the FSIA—non-immunity—was not met, we do not reach the second, third, or fourth of Guinea's subject matter jurisdiction arguments.[9]

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[9] MINE has not argued that the District Court's finding that it had jurisdiction under the FSIA in the earlier section 4 proceeding to compel bars Guinea from questioning the District Court's exercise of jurisdiction in the section 9 proceeding to confirm now under review. Because the section 9 proceeding adjudicated a different claim from that in the earlier proceeding, any preclusive effect would derive from the doctrine of collateral estoppel, not res judicata. *See Commissioner v. Sunnen,* 333 U.S. 591, 597-98, 68 S.Ct. 715, 719-720, 92 L.Ed. 898 (1948); *Nasem v. Brown,* 595 F.2d 801, 805 n. 8 (D.C.Cir. 1979). That doctrine requires that even issues less basic than jurisdiction be fully litigated before they are preclusively established. *See McCord v. Bailey,* 636 F.2d 606, 609 (D.C.Cir. 1980), *cert. denied,* 451 U.S. 983, 101 S.Ct. 2314, 68 L.Ed.2d 839 (1981); 1B Moore's Federal Practice ¶ 0.443[3] (2d ed. 1982). Guinea did not appear in the first proceeding, so the issue was not fully litigated and may be raised at this time.

Moreover, we would almost certainly reach the same result were we to apply the doctrine of res judicata by somehow viewing Guinea's raising of the jurisdictional issue in the confirmation proceeding as a collateral attack on the holding of the proceeding to compel. As the Supreme Court recently reaffirmed, "A defendant is always free to ignore the judicial proceedings, risk a default judgment and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Insurance Corp. v. Compagnie des Bauxites de Guinee,* ____ U.S. ____, 102 S.Ct. 2099, 2106, 72 L.Ed.2d 492 (1982). Even if this rule preserves only *personal*-jurisdiction attacks, it would preserve Guinea's immunity defense, which addresses both personal and subject matter jurisdiction.

III

With the passage of the FSIA, Congress enacted a comprehensive scheme setting forth "when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States," and "when a foreign state is entitled to sovereign immunity." H.R.Rep. No. 94-1487, 94th Cong., 2d Sess. 6 (1976), U.S.Code Cong. & Admin.News 1976, p. 6604. The application of this scheme requires some unraveling of the Act's interlocking provisions governing the separate issues of subject matter jurisdiction, sovereign immunity, and personal jurisdiction.

Subject matter jurisdiction is addressed by section 1330(a), 28 U.S.C. § 1330(a) (1976), which creates in federal district courts

> original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

The Act thereby connects the issue of subject matter jurisdiction to the issue of sovereign immunity: the absence of immunity is a condition to the presence of subject matter jurisdiction.

Personal jurisdiction is governed by section 1330(b), *id.* § 1330(b):

> Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

In other words, a lack of subject matter jurisdiction also deprives the court of personal jurisdiction under the Act.

Whether subject matter and personal jurisdiction existed under the Act, then, turns [**1100**] in the first instance on whether Guinea was entitled to immunity under sections 1605

and 1607. These sections set forth the exceptions to the general principle, stated in section 1604, *id.* § 1604, that foreign states are immune from the jurisdiction of federal and state courts, subject to existing international agreements to which the United States was a party at the time of the Act's passage. Of these exceptions, only subsections (a)(1) and (a)(2) of section 1605 have possible relevance to this case; the District Court found that each supported a finding of non-immunity and, hence, of subject matter jurisdiction.

A.

Section 1605(a)(1) states that a foreign state shall not be immune in any case

> in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

The SOTRAMAR codicil, we recall, stated that the parties would arbitrate before arbitrators selected by the "President of the International Court of Settlement of International Disputes [sic] in Washington (CIRDI)." J.A. 229.

Applying section 1605(a)(1) to the parties' agreement, the District Court began by noting that ICSID's Rules of Procedure call for ICSID tribunals to meet at the seat of ICSID—Washington, D.C.—unless another site is agreed upon by the parties and approved by ICSID. *MINE v. Guinea,* 505 F.Supp. at 143. Therefore, the court reasoned, the parties must have contemplated that arbitration would take place in the United States. Because the legislative history indicates that implicit waiver may be found "in cases where a foreign state has agreed to arbitration in another country," H.R.Rep. No. 94-1487, *supra,* at 18, the court concluded that the SOTRAMAR arbitration clause constituted such a waiver. *MINE v. Guinea,* 505 F.Supp. at 143.

Guinea challenges this conclusion on the ground that an agreement to submit future disputes to an ICSID arbitration cannot be deemed an implied waiver of immunity within the

meaning of the FSIA.[10] Appellant's Br. 26-28. MINE, however, claims that we need not read the District Court as implying the proposition that Guinea attacks. According to MINE, the SOTRAMAR arbitration clause did not contemplate a formal ICSID arbitration, but merely provided for a non-ICSID arbitration to be undertaken by arbitrators chosen by ICSID's President. Appellee's Br. 23 n. 16, 56. The only question we must decide, MINE asserts, is whether the clause, when read this way, constitutes an implicit waiver of immunity.

We are bound not to disturb a factual finding of the District Court unless it is clearly erroneous. *See* Fed.R.Civ.P. 52(a). In this case, the District Court's waiver holding was unquestionably based on the factual conclusion that the parties had contemplated an ICSID arbitration. First, as stated above, a central ingredient of that holding was the ICSID procedural

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[10] MINE also argues that the SOTRAMAR contract constituted an explicit waiver of immunity within the meaning of section 1605(a)(1). Appellee's Br. 19-20. MINE can point to no particular provision in the contract arguably concerning immunity; rather, MINE rests its argument on the fact that the SOTRAMAR venture was a "mixed-economy" company under the laws of Guinea. Participation in such a company amounted to an explicit waiver, in MINE's view, because Guinean law provides that the state in a mixed economy company is a shareholder and that the state's rights and obligations are derived from its standing as a shareholder rather than as a state. *Id.*

Although a state can explicitly waive its immunity in a contract with a private party, H.R. Rep. No. 94-1487, *supra*, at 18, MINE's argument falls far short of demonstrating such a waiver. This becomes clear upon reading the House Report's comments about withdrawals of waivers:

> [I]f the foreign state agrees to a waiver of sovereign immunity in a contract, that waiver may subsequently be withdrawn only in a manner consistent with the expression of the waiver in the contract. Some court decisions have allowed subsequent and unilateral rescissions of waivers by foreign states. But the better view, and the one followed in this section, is that a foreign state which has induced a private person into a contract by promising not to invoke its immunity cannot, when a dispute arises, go back on its promise and seek to revoke the waiver unilaterally.

Id. These statements suggest that Congress contemplated waivers of a much more specific and explicit nature than the one MINE constructs from the operation of this Guinean law.

rule stating that ICSID arbitrations shall normally take place at ICSID's seat in Washington, [1101] D.C. From this rule the court inferred that the parties must have anticipated that arbitration would occur in the United States. *MINE v. Guinea,* 505 F.Supp. at 143. Obviously, the court would not have attached significance to the ICSID rules had it not understood the SOTRAMAR contract as contemplating an arbitration that would be subject to those rules—an ICSID arbitration. Second, the District Court described MINE's effort to have Guinea sign a revised submission to the jurisdiction of ICSID as an attempt to have the dispute heard "in arbitration *as contemplated by the contract.*" *Id.* at 142 (emphasis added); *see also id.* at 142 n.2 (parties dispute whether MINE "could have proceeded to arbitration *in the manner contemplated by the contract* despite Guinea's refusal to participate [by refusing to sign the revised joint submission]") (emphasis added). Because exhibits filed by MINE itself in connection with its motion to confirm demand this very conclusion,[11] we cannot say that the District Court's factual finding was clearly erroneous.[12]

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[11] One exhibit, a copy of the "Demand for Arbitration" that MINE presented to the AAA, contains the following statement:

> Disputes between M.I.N.E. and Guinea arose out of and relating to the Agreement. In 1975, M.I.N.E. sought to obtain from Guinea a proper and correct joint submission of their dispute to ICSID. Guinea, however, failed and refused to sign such a submission or to proceed with arbitration. The refusal by Guinea to execute a revised joint submission or otherwise cooperate with M.I.N.E.'s efforts made unavailable the method originally agreed upon by the parties for choosing arbitrators.

J.A. 103. A reference in another exhibit echoes the allegation that the failure to sign a submission to ICSID frustrated the method "originally agreed upon by the parties." J.A. 93 (affidavit of MINE's then-attorney). The clear import of these statements is that the parties contemplated an ICSID arbitration.

[12] We find an alternative reason to reject MINE's contention that the parties contemplated a non-ICSID arbitration in the fact that MINE consistently seems to have urged a contrary version of events on the District Court. Establishing the proper context for an understanding of how MINE's position changed on appeal requires us to elaborate a few important details. As noted earlier, the contract contained a clause calling for arbitration of

(footnote continues)

[1102]Thus, it is the District Court's waiver holding that we now evaluate—that the parties' agreement to submit future disputes to an ICSID arbitration can be deemed an implicit waiver of immunity within the meaning of section 1605(a)(1).

(footnote continued)

disputes by a panel of three arbitrators selected by the President of ICSID. J.A. 226; *id.* 229 (codicil). By its terms alone, this arbitration clause is indeed consistent with the argument MINE now offers for the first time on appeal: that the parties did not intent ICSID to conduct a formal arbitration, but only to have a hand in the selection of arbitrators. The language of the contract, however, is not the only evidence presented that was relevant to the parties' intended agreement to arbitrate. To begin with, the parties' subsequent conduct bears out that they had initially contemplated an ICSID arbitration: when the dispute ripened, both parties signed a form in which they consented to submit the dispute to the jurisdiction of ICSID. J.A. 319.

It is important to note why they found this later joint consent to be necessary. Under the ICSID Convention, ICSID jurisdiction can only be extended to controversies "which the parties to the dispute consent in writing to submit to [ICSID]." Convention art. 25(1). The written request must "contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings." *Id.* art. 36(2). MINE contended before the District Court that the later joint consent was necessary because "[t]he Contract did not contain language of consent and submission in ac[c]ordance with ICSID's suggested clauses, or otherwise." J.A. 252 n.9. That is, the contract did not *"evidence[]"* the consent of both parties to submit the dispute to ICSID's jurisdiction in a way that ICSID could recognize. *Id.* at 252 (emphasis added); *see id.* at 251 (contract "did not of *itself* constitute a mutual consent and submission to ICSID's jurisdiction") (emphasis added).

None of this denies, however, that MINE and Guinea had initially intended their arbitration clause to call for arbitration before ICSID. Guinea was not the only side to contend that this was both parties' intent all along. Time and time again MINE affirmed before the District Court that the original intent of the agreement was to have an ICSID arbitration. *See supra* note 11. Thus, even though the language of the contract was not technically sufficient to invoke ICSID procedures (a fact that led the parties to submit additional evidence of their consent to ICSID's jurisdiction), the conduct of the parties after the dispute had ripened and MINE's own representations before the District Court make clear that the arbitration to which both parties intended initially to agree was an ICSID arbitration.

(footnote continues)

> Explaining this section, the House Report stated:
>
> With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract.

H.R.Rep. No. 94-1487, *supra,* at 18, U.S. Code Cong. & Admin.News 1976, p. 6617. Because the SOTRAMAR contract expressly stated that the law of Guinea would apply to interpretation of the contract, J.A. 222, only the first instance mentioned in the quoted language is relevant to the question at

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(footnote continued)

MINE tries to reconcile these earlier representations with the theory that the parties originally contemplated a non-ICSID arbitration by offering the following scenario: MINE "approached ICSID to determine how and when the President might select the three arbitrators"; ICSID personnel informed MINE that "such a procedure is unknown to the organization"; MINE "reluctantly concluded that the informal procedure contemplated by the agreement . . . could not be accomplished"; and only then did the parties sign the ICSID consent form. Appellee's Br. 55-56.

The initial problem with this scenario is that the ordering of events it portrays conflicts with the sworn affidavit submitted to the District Court by MINE's attorney. According to that document, MINE's attorney met with an ICSID official, not "to determine how and when the President might select the three arbitrators," as MINE now claims, but "in order to determine whether it was possible to submit the dispute between Petitioner and Respondent *to ICSID* for arbitration. . . ." J.A. 293 (emphasis added). This refutes MINE's present claim that the parties did not contemplate an ICSID arbitration until after the discouraging revelations of this meeting.

Even ignoring evidence discrediting MINE's newest version of events, however, we find no effort by MINE to prove or even to argue this scenario before the District Court. In an effort to show that the immunity provisions of the ICSID Convention never became applicable, MINE did reiterate near the end of oral argument that the contractual arbitration clause alone never amounted to a consent sufficient to trigger ICSID jurisdiction. Transcript of January 8, 1981, Hearing, at 25 (Immunity under the Convention "presupposes that ICSID has jurisdiction and the parties have duly consented to ICSID. [Yet t]he parties did not consent to ICSID . . . . the agreement merely says that the president of ICSID would choose the arbitrator."); *id.* at 25-26 (The vice-president and general counsel of ICSID "did not consider that [contract] adequate consent. There has been no adequate consent for three

(footnote continues)

hand.[13] Upon considering this phrase in light of the nature of an ICSID arbitration, we conclude that the SOTRAMAR agreement was not an implicit waiver of immunity within the meaning of the FSIA.

As noted earlier, ICSID was established by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, an international agreement to which more than seventy-five foreign states are parties. Under the Convention, which has been implemented by legislation in the United States, 22 U.S.C. §§ 1650-1650a (1976), ICSID has "full international legal personality," Convention art. 18. ICSID's purpose is to make available to "Contracting States and nationals of other Contracting States" facilities for the conciliation and arbitration of investment disputes. *Id.* art. 1(2). ICSID arbitrations are undertaken by tribunals constituted under the Convention and subject to the rules of ICSID. *Id.* art. 44. In settling disputes, [**1103**] those tribunals apply

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(footnote continued)

years."). But we find nothing in any of MINE's arguments that departs from the view it espoused until this present appeal: that the parties intended an ICSID arbitration when they drafted the contract; that the fact that the arbitration clause provided explicitly only for the President of ICSID to choose arbitrators rendered it technically insufficient to get ICSID to act; that, in an effort to carry out this original intent, the parties attempted to submit a technically-correct consent to ICSID; and that for one reason or another these efforts never actually brought the dispute within ICSID's jurisdiction.

Therefore, even had the District Court not found that the parties initially agreed to an ICSID arbitration, we would have ample reason to reject MINE's contrary contention on appeal. At best the contention rests on a factual premise that was not developed before the District Court, *see Carr v. District of Columbia,* 543 F.2d 917, 921-22 (D.C.Cir. 1976), and at worst it is contradicted by the factual record that the parties did develop.

[13] Of course, an agreement to apply Guinean law is literally an agreement to apply the law of a "particular" country. Courts have generally assumed, however, that Congress did not endorse the literal wording of the House Report, for when paraphrasing the report they say waiver is to be found when a foreign state agrees to apply the law of "another" country. *See Ohntrup v. Firearms Center Inc.,* 516 F.Supp. 1281, 1284 (E.D.Pa. 1981) (mem. op.); *Castro v. Saudi Arabia,* 510 F.Supp. 309, 312 (W.D.Tex. 1980). Because MINE has not questioned this reading of congressional intent, we see no reason to do so at this time.

"such rules of law as may be agreed by the parties"; when no such agreement exists, the law of the "Contracting State party" and rules of international law apply. *Id.* art. 42(1).

A primary motivation for the Convention was the recognition that international methods of dispute settlement should be available in addition to national legal processes. *Id.* preamble. As stated in an ICSID general information document, ICSID "provides means for a Contracting State to have a dispute with an investor internationally adjudicated without having to bring action in a foreign court or to undertake intergovernmental litigation with the investor's State." International Centre for Settlement of Investment Disputes, Doc. ICSID/12, *reprinted in* Appellant's Addenda.

The provisions governing ICSID arbitrations give effect to this aim. Article 26 of the Convention states: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy." In addition, the ICSID processes are self-executing once a proper request is submitted to ICSID: an arbitral tribunal is constituted upon receipt of the request, the tribunal itself decides the issue of jurisdiction, and awards rendered by the tribunal are certified by ICSID as binding and enforceable. *Id.* arts. 36, 41, 49, 53.

Relying on these facts, the State Department has urged this court to find that agreements to arbitrate with ICSID do not contemplate the involvement of domestic courts, at least not before a final ICSID decision is to be enforced.[14] Brief for the

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[14] At the enforcement stage, the ICSID treaty, *see* Convention art. 54, and a supporting United States statute, 22 U.S.C. § 1650a (1976), provide that ICSID arbitrations are to be enforced as judgments of sister states. We need not decide whether Guinea's signing of the ICSID treaty would thus waive its immunity from proceedings enforcing ICSID awards, for this is a proceeding to confirm an *AAA* arbitration. We also do not express opinions (1) whether any waiver of immunity for ICSID *enforcement* proceedings would also waive immunity for suits to *compel* ICSID arbitrations, or (2) whether Congress's declaration that the Federal Arbitration Act "shall not apply to enforcement of awards rendered" by ICSID, *id.*, prohibits proceedings to *compel* ICSID arbitrations. Resolution of neither point is implicit in our holding today, for we decide that this ICSID agreement did not contemplate the involvement of domestic courts before the enforcement stage only because MINE cannot contend otherwise in this litigation.

United States as Intervenor and Suggestion of Interest 54. We need not reach this precise question here, however. MINE has insisted, and is estopped from denying, that United States courts were powerless to compel an ICSID arbitration under this particular arbitration agreement. Appellee's Br. 57 & n. 49; Appellee's Reply Br. to Br. for United States 23, 25; J.A. 253 (memorandum before District Court) ("as both ICSID and its President enjoy sovereign immunity, this court could not compel the President of the World Bank to appoint arbitrators in this matter"). MINE contended that an ICSID arbitration was unavailable in order to induce the District Court to go beyond the express terms of the arbitration clause and compel arbitration before the American Arbitration Association. Given that this point is now established for purposes of this litigation, we have no trouble holding that this particular ICSID agreement was not an agreement "to arbitration in another country" that waives sovereign immunity under the FSIA.[15] A key reason why pre-FSIA cases found that an agreement to arbitrate in the United States waived immunity from suit was that such agreements could only be effective if deemed to contemplate a role for United States courts in compelling arbitration that stalled along the way. *See, e.g., Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes,* 336 F.2d 354, 363-64 (2d Cir. 1964) (discussing consent to in personam jurisdiction), [**1104**] *cert. denied,* 381 U.S. 934, 85 S.Ct. 1763, 14 L.Ed.2d 698 (1965); *see also* Note, *Maritime International Nominees Establishment v. Republic of Guinea:* Effect on U.S. Jurisdiction of an Agreement by a Foreign Sovereign to Arbitrate Before the International Centre for the Settlement of

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[15] Because the ICSID arbitration was to take place in the United States unless otherwise specified, *see* pp. 1100 *supra,* we need not speculate about whether the courts of some other country might find themselves empowered to compel an ICSID arbitration. Thus, although other courts have found it necessary to hold that only an agreement to arbitrate in *this* country will waive a sovereign's immunity in United States courts, *see Ohntrup v. Firearms Center Inc.,* 516 F.Supp. 1281, 1285 (E.D.Pa. 1981) (mem. op.); *Verlinden B.V. v. Central Bank of Nigeria,* 488 F.Supp. 1284, 1301-02 (S.D.N.Y. 1980), *aff'd on other grounds,* 647 F.2d 320 (2d Cir. 1981), *cert. granted,* ____U.S. ____, 102 S.Ct. 997, 71 L.Ed.2d 291 (1982), we do not settle that question here.

Investment Disputes, 16 Geo. Wash.J. Int'l L. & Econ. 451, 463-66 (1982). As this particular ICSID agreement concededly did not foresee such a role for United States courts, we hold that it did not waive Guinea's sovereign immunity even though the agreed-to arbitration would probably take place on United States soil.

B.

The second immunity provision relevant to this case is section 1605(a)(2). This section sets forth, in the words of the House Report, "probably the most important instance in which foreign states are denied immunity, that in which the foreign state engages in a commercial activity." H.R. Rep. No. 94-1487, *supra,* at 18, U.S. Code Cong. & Admin.News 1976, p. 6617. The section states that a foreign state shall not be immune in any case

> in which the action is based upon [1] a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

The District Court seems to have held that both the first and third clauses of the section were satisfied. *MINE v. Guinea,* 505 F.Supp. at 143. After stating this conclusion, the court went on to list the activities of Guinea that supported it:

> Numerous meeting were held, including meetings in Connecticut and in the District of Columbia, relating to the contract. Guinea directed an American shipping group to perform substantial activities to aid SOTRAMAR. The Guinean ambassador to the United States engaged in several business-oriented contacts with officials of petitioner [MINE] related to the project.

Id. The sum of these activities, the court continued, was "more than sufficient to constitute commercial activity within the

meaning of section 1605(a)(2)." *Id.* To examine this holding, we turn separately to the first and third clauses of section 1605(a)(2).[16]

1.

The first clause, like the remaining two, contains the phrase "commercial activity," which the Act defines as follows:

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d)(1976). The first clause receives further definition:

> A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

Id. § 1603(e).

Part of the first clause is easily applied in this case. The "regular course of commercial conduct" or "particular commercial transaction" on which MINE's action "is based" is the SOTRAMAR contractual undertaking; that activity clearly is of the commercial nature contemplated by the Act's exceptions. *See* H.R.Rep. No. 94-1487, *supra,* at 16. The more difficult question is whether the SOTRAMAR venture was "carried on in the United States by a foreign state," that is, "carried on by

[16] The second clause has no relevance to this case. The "act" on which this action is "based"—the alleged breach of the SOTRAMAR contract—is not claimed to have been "performed in the United States."

such state and having substantial contact with the United States." Upon examining the findings of the District Court,[17] we must answer this question in the negative.

[**1105**] We turn first to the District Court's conclusion that "Guinea directed an American shipping group to perform substantial activities to aid SOTRAMAR." *MINE v. Guinea,* 505 F.Supp. at 143. An analysis of this finding must immediately confront the Act's requirement that the commercial activity be "carried on by" the foreign state. We have no doubt that in appropriate circumstances the activities of another may be attributed to the foreign state for purposes of the section 1605(a)(2) exception. Especially given the realities of modern commercial undertakings, a contrary conclusion would undermine "Congress's concern with providing 'access to the courts' to those aggrieved by the commercial acts of a foreign sovereign," *Texas Trading & Milling Corp. v. Federal Republic of Nigeria,* 647 F.2d 300, 312 (2d Cir.1981) (quoting H.R. Rep. No. 94-1487, *supra,* at 6), *cert. denied,* ____U.S.____, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982). On the other hand, this same principle and the words of the statute impose some limits on when a foreign state can be deemed to have "carried on" activities actually performed by another.

The legislative history gives some guidance in discovering those limits. Although Congress did not elaborate on the "carried on by" requirement, it stated that some activities falling within the first clause of section 1605(a)(2) might also satisfy the second: an "act performed in the United States in connection with a commercial activity of the foreign state

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[17] MINE adds to these findings the argument that Guinea's alleged breach resulted in "contact with the United States" for purposes of the first clause: "Each ton of bauxite which should have been carried by SOTRAMAR to destinations in the United States was instead carried to those same destinations by Afro-Bulk." Appellee's Br. 26. The District Court made no such finding, and MINE supports its contention in part with evidence outside the record. *Id.; see* Fed.R.App.P. 10. As will be clear from our discussion of the contacts listed by the District Court, the record properly before us cannot sustain the assertion, implicit in MINE's argument, that under the SOTRAMAR contract arrangements had been made to transport bauxite to destinations in the United States.

elsewhere." One example of the latter, Congress went on, might be "a representation in the United States by an agent of a foreign state that leads to an action for restitution based on unjust enrichment." H.R.Rep. No. 94-1487, *supra,* at 19, U.S. Code Cong. & Admin.News 1976, p. 6617. This reference to "an agent of a foreign state" suggests that a foreign state, in Congress's view, can surrender immunity by virtue of activities committed by an agent, and that, consequently, the "carried on by" requirement can be interpreted in light of broad agency principles. While we do not suggest that those principles should be applied rigidly and in all their detail to the immunity determination, it seems evident that to throw the net of responsibility much wider would be to ignore the words Congress employed in both the statute and the legislative history.

We also think it appropriate to note the well-established principle that, in assessing personal jurisdiction under either a constitutional due process standard or a statutory standard, courts may look to the contacts between the forum and agents of the defendant. *Texas Trading,* 647 F.2d at 314-15; C. Wright & A. Miller, Federal Practice and Procedure § 1069, at 251-52 (1969). This principle is of relevance to the immunity exception because Congress viewed that exception not only as governing the immunity determination, but also as representing a central component in the Act's structure for personal jurisdiction:

> For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity . . . . These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction.

H.R.Rep. No. 94-1487, *supra,* at 13, U.S. Code Cong. & Admin.News 1976, p. 6612. Although we do not understand this statement to mean that the statutory standard for determi-

ning non-immunity is coextensive with the due process standard governing personal jurisdiction,[18] *see World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed. 2d 490 (1980); *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), we think it relevant that viewing the "carried on by" requirement in light of agency principles would be compatible with well-established due process analysis.

[**1106**] Our views find support in several decisions of other courts. In *Yessenin-Volpin v. Novosti Press Agency,* 443 F.Supp. 849 (S.D.N.Y.1978), plaintiff filed a libel suit against three defendants, two of which were Soviet Union information agencies that claimed immunity under the FSIA. Both were alleged to have written defamatory articles and to have caused the publication of those articles in periodicals that were circulated to the public in the United States. Applying the section 1605(a)(2) exception, the court rejected the relevance of the first clause, because "the allegedly offending articles were published outside the country and sent into the United States by means wholly outside the control of either [defendant]." *Id.* at 855. The court, in other words, properly rejected the proposition that a foreign state "carries on" activities performed by another entity simply because the state and that entity, although unconnected with each other, can both be seen as participating in the same larger commercial endeavor.

In *Bankers Trust Co. v. Worldwide Transportation Services, Inc.,* 537 F.Supp. 1101 (E.D.Ark.1982), a restitution action involving as one defendant an official agricultural organ of the Federal Republic of Mexico, the court held that the "com-

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[18] Of course, a finding of FSIA personal jurisdiction, which would rest in part on a finding of non-immunity, must comport with the demands of due process, and Congress intended that the Act satisfy those demands, H.R.Rep. No. 94-1487, *supra,* at 13. But the immunity determination involves considerations distinct from the issue of personal jurisdiction, and the FSIA's interlocking provisions are most profitably analyzed when these distinctions are kept in mind. *See generally Texas Trading,* 647 F.2d 300; Kane, Suing Foreign Sovereigns: A Procedural Compass, 34 Stan.L.Rev. 385, 402-04 (1982).

mercial activity" of that defendant included activities performed by a bank and a company acting as the defendant's agents in the United States.

Before examining against this conceptual backdrop the District Court's finding that "Guinea directed an American shipping group to perform substantial activities to aid SOTRAMAR," we should examine the evidence in the record relevant to that finding. The record discloses that fairly substantial SOTRAMAR-related activities were undertaken in the United States by a company usually referred to as "Global." J.A. 265, 270-72. There is evidence that Global maintained an office in Stamford, Connecticut. J.A. 270-71.

Global's activities can be grouped under two categories. First, there is evidence that Global played a major role in preparing a report, termed a "feasibility" or "technical" study, in connection with the SOTRAMAR venture. J.A. 273, 288. In connection with this report, the record suggests, Global held meetings, expended funds, and prepared route and rate computations in the United States. J.A. 270-72. Second, the record contains evidence that Global's connection with SOTRAMAR went beyond the preparation of the report, and extended also to involvement in the shipping of Guinean bauxite. J.A. 275-77.

As to the connection between MINE and Global, the record contains evidence of communication and cooperation between MINE and Global on the report. J.A. 270-72. There are also statements in the record that suggest communication between MINE and Global with respect to Global's other activities. J.A. 276-78. No evidence at all concerns the nature of Global's corporate structure, and the only evidence of the organizational relationship between MINE and Global are the several references to "MINE/Global." J.A. 231, 233.

The record casts an even dimmer light on the connection between Guinea and Global. The second codicil to the SOTRAMAR contract contains two references to "MINE/Global." The first notes that delegates of Guinea and

of MINE/Global met to agree upon the codicil. J.A. 231. The second states:

> In order to make it compatible with that option of lease-sale of a part of the ships supplied by MINE/GLOBAL, the Addendum [the first codicil] of October 11, 1971 is added to as follows:
> "The other ships shall fly a flag agreed to by both parties which flag in fact shall be the neutral one of Panama for the duration of the lease-sale."

J.A. 233.

Finally, there is some evidence connecting Guinea with the report. The record includes a letter, dated September 11, 1972 and written by MINE's then-attorney to a Guinean representative, concerning the former's views as to "the problems now facing SOTRAMAR." J.A. 288. The letter contains the following statement:

> Many different methods of obtaining ships for SOTRAMAR have been detailed. For example, at the request of the Guinean partners, MINE prepared an extensive technical study which was presented at the May 1972 meeting in Conakry [Guinea].

J.A. 288. Another record item suggests that MINE and Global, while preparing the report, contemplated presenting it to Guinea at a future date. J.A. 272. Also deserving of mention is the provision in the SOTRAMAR contract stating that the parties [**1107**] would make a "market study" before SOTRAMAR was formed. J.A. 225.

Although the District Court's conclusion that Guinea "directed" Global to perform activities may be interpreted several ways, it can satisfy the first clause only if read to mean that Guinea authorized Global to perform actions on Guinea's or SOTRAMAR's behalf in the United States. *See* Restatement (Second) of Agency §§ 1, 26 (1958). The record cannot sustain this reading, however, even when analyzed with the understanding that the necessary authorization can be conferred by a variety of means, *see id.* § 26.

We note at the outset, with respect both to the preparation of the report and to other activities performed by Global, that there is no evidence of any written or otherwise express authorization from Guinea to Global. Our inquiry thus becomes whether anything in the record can reasonably be read to imply authorization of Global's services. First, concerning activities related to the report, we find that the record contains no evidence supporting this implication. The statement in the letter from MINE's attorney suggests only that Guinea requested MINE to prepare a report. Although a request to one party may, by its nature or context, necessarily imply the need to enlist the services of another, *see id.* § 79, MINE has not shown that Guinea's request was of this sort. Similarly, MINE has not shown that the provision in the SOTRAMAR contract requiring the parties to make a "market study," J.A. 225, constituted an authorization by Guinea for MINE to use Global's services on Guinea's behalf.

Moreover, the mention in the record that MINE and Global eventually presented the report to Guinea does not evidence sufficient knowledge of or acquiescence in Global's involvement. The record contains nothing to indicate that Guinea monitored or received information about the report during its preparation. One portion of the record, in fact, suggests the opposite. At the arbitration hearings, MINE's former attorney testified as follows:

> So this work [the report] was done in Stamford and with the aid of their [Global's] technicians, their general counsel, me, their outside counsel, Mr. Anada[19] attended substantially all of those meetings from Geneva, other people would come from Geneva, and we worked out how the financing would work, what rates were necessary and so on. Then you will also find it was necessary to show the not too sophisticated Guinean people when they would see this report why it was being done this way.

J.A. 272.

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[19] According to MINE's memorandum in reply to Guinea's motion to dismiss, Mr. Anada was a MINE official. J.A. 239 n. 5.

Second, with respect to any non-report-related activities, the record is likewise devoid of evidence from which we can infer implicit authorization. The only record item of any relevance is the second codicil, with its mention that delegates of "MINE/Global" met with Guinea and that the first codicil had been amended "to make it compatible with that option of lease-sale of a part of the ships supplied by MINE/Global." These references, standing alone, are too sparse in detail to allow a conclusion that Global was acting under authority conferred by Guinea.

We must conclude, then, that Guinea did not "carry on" the activities performed by Global. Global, of course, was not the only entity that acted in the United States; several items in the above-described record suggest that MINE also undertook actions there. We hesitate to evaluate these facts at length, for the District Court made no finding that Guinea "directed" these activities. The record might support a conclusion, however, that Guinea requested MINE to prepare a study, *supra* p. 1106, and that MINE attended meetings in the United States with Global in connection with that study. *See* J.A. 265, 270-71. We cannot say with certainty that the report requested was actually the same report MINE worked on in the United States. But even if it was, the record does not show that the understanding between MINE and Guinea reached the stage at which MINE's actions in the United States could be deemed to be carried on by Guinea for purposes of the FSIA. Explaining why this is so requires us to sharpen slightly the principles that govern this inquiry.

We have said that Global's activities in the United States cannot waive Guinea's immunity if Guinea did not authorize them. But this is not to say that every action [**1108**] Guinea "authorizes" which eventually touches American soil will waive Guinea's immunity. We find aid in discerning the far reaches of

the "carried on" requirement by considering once more principles of personal jurisdiction.[20] The Supreme Court helped clarify some of those principles in *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239-1240, 2 L.Ed.2d 1283 (1958):

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Accord Texas Trading, 647 F.2d at 314-15 (applying test to foreign sovereign).

In this case the record will not support the conclusion that, through MINE's meetings with Global in the United States concerning the preparation of a report, Guinea purposefully availed itself of the benefits of conducting business in the United States. MINE has offered no evidence that Guinea requested that the study be done in the United States. Nor has it shown that preparation of a preliminary market study is an activity necessarily, foreseeably, or likely to be undertaken in the United States. And we do not find MINE's activities in the United States to be so extensive that we will impute to Guinea, without more, a purposefulness that is not otherwise found in the record. We are concerned, of course, by the fact that Guinea in some sense benefited from activities conducted in the United States by MINE. But in an interdependent world economic system many foreign states may benefit from the acts of others in the United States but still not be considered themselves to be conducting business in the United States within the contemplation of Congress. We thus find that MINE

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[20] We are bound in a more basic sense, of course, by constitutional precepts of personal jurisdiction, but we go no further than the statute itself to decide this particular question. And we note once more that while personal jurisdiction principles shed light on the immunity determination, the two inquiries are not entirely the same. *See supra* note 18.

has not proved Guinea to be sufficiently a part of MINE's activities in the United States that Guinea surrendered its immunity by virtue of those activities.[21]

Continuing our search for activity that might satisfy the first clause of section 1605(a)(2), we turn to the District Court's finding that "[n]umerous meetings were held, including meetings in Connecticut and in the District of Columbia, relating to the contract." *MINE v. Guinea,* 505 F.Supp. at 143. There is evidence that meetings took place, but, with one exception, no reference to such a meeting indicates that Guinea was present. Because these references do not contain any information that adds to the evidence of authorization that we have already considered, these meetings cannot be seen as activity "carried on by" Guinea.

The one exception is a meeting between MINE and a Guinean representative or representatives, which took place in a Washington, D.C., hotel in September 1973, and which apparently concerned the operation of SOTRAMAR. J.A. 278, 288. Although this meeting is mentioned in a fairly lengthy letter from MINE's then-attorney to a Guinean representative, the letter primarily summarizes the history of SOTRAMAR-related discussions, and therefore gives no clear sense of the scope of the Washington meeting.[22] Whether the requirement of "substantial contact" is satisfied requires evaluation not only of this [**1109**] meeting, but also of the District Court's third finding.

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[21] Because we find the link between Guinea on one hand and MINE's report activities in the United States on the other to be too weak to attribute MINE's actions here to Guinea, we necessarily find that the path from Guinea to MINE and then from MINE to Global stretches too far to link Guinea with Global indirectly. We distinguish this point from our discussion earlier, *supra* pp. 1106-1107, showing the lack of evidence directly linking Global with Guinea.

[22] The letter begins with the following statement:

> Following the meeting of Sunday, September 9, 1973, in Washington, MINE, Inc. believes it useful to lay before you for your consideration the following views of the problems now facing SOTRAMAR.

(footnote continues)

Although the third finding states that "[t]he Guinean ambassador to the United States engaged in several business-oriented contacts with officials of [MINE] related to the project," *MINE v. Guinea,* 505 F.Supp. at 143, the record contains a suggestion of only one such contact. A portion of a MINE official's arbitration testimony relates the following:

> But when we discovered about this breach or about the negotiations with Afrobulk, we were very disappointed and we asked for a meeting with the Guineans. We came to see the ambassador in Washington also, asking him—we were sent actually to see him by the government.

J.A. 267. This vague statement is scarcely evidence that a meeting occurred at all, and we can only speculate as to that meeting's scope or nature.

An evaluation of these two contacts under the first clause must begin with the recognition that, in Judge Weinfeld's words, Congress "underscore[d] the fact that the 'commercial activity carried on in the United States' must be substantial to support jurisdiction." *Verlinden B.V. v. Central Bank of Nigeria,* 488 F.Supp. 1284, 1296 (S.D.N.Y.1980), *aff'd on other grounds,* 647 F.2d 320 (2d Cir.1981), *cert. granted,* ____ U.S. ____, 102 S.Ct. 997, 71 L.Ed.2d 291 (1982). In choosing those words, Congress made clear that the immunity determination under the first clause diverges from the "minimum contacts" due process inquiry, as well as from jurisdictional determinations under state long-arm statutes.[23] We cannot conclude that

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(footnote continued)

J.A. 288. No further reference is made to the Washington meeting until near the letter's conclusion:

> In view of the facts set forth above and the references of Your Excellency on September 9, 1973 to the need to change the entire basic SOTRAMAR Convention. . . .

J.A. 291.

[23] The legislative history does not contradict the clear import of the words Congress chose. Commenting on section 1330(b), which concerns personal jurisdiction under the Act, the House Report stated that the immunity provisions "prescribe the necessary contacts [the "minimum contacts" requirement of *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.E.d. 95 (1945)] which must exist before our courts can

(footnote continues)

these two isolated meetings amounted to more than "transitory" and "insubstantial" contact for purposes of the Act, *see Verlinden,* 488 F.Supp. at 1297, especially given their uncertain scope and importance.[24]

(footnote continued)

exercise personal jurisdiction." H.R.Rep. No. 94-1487, *supra,* at 13, U.S.Code Cong. & Admin.News 1976, p. 6612. To read "substantial contact" as demanding more than "minimum contacts" is fully compatible with this statement.

Congress also noted that section 1330(b) is "in effect, a Federal long-arm statute over foreign states. . . . It is patterned after the long-arm statute Congress enacted for the District of Columbia." H.R.Rep. No. 94-1487, *supra,* at 13, U.S.Code Cong. & Admin.News 1976, p. 6612. The phrase "patterned after" is not a clear mandate to interpret the immunity exceptions in light of the District of Columbia long-arm statute, and "[t]here are significant differences in language and effect between the District's statute and the Act, which Congress, the author of both, could not have overlooked," *Verlinden,* 488 F.Supp. at 1295. *Accord Texas Trading,* 647 F.2d at 311; *Harris v. VAO Intourist,* 481 F.Supp. 1056, 1063-65 (E.D.N.Y.1979) (mem. op.). While these differences might not always undermine the usefulness of referring to the District of Columbia statute, *see VAO Intourist,* 481 F.Supp. at 1064-65, the "substantial contact" requirement has not even a remote relative in that statute. *See D.C.Code* § 13-423(a)(1) (1981) (allows personal jurisdiction as to a claim arising from the person's "transacting any business in the District of Columbia").

[24] Although case law construing the phrase "substantial contact" is not extensive, our conclusion finds support by way of contrast with cases that find jurisdiction. *See Gemini Shipping, Inc. v. Foreign Trade Org. for Chems. & Foodstuffs,* 647 F.2d 317, 319 (2d Cir. 1981) (defendant solicited bids in U.S. and paid under a contract through a letter of credit confirmed by a New York bank); *Ohntrup v. Firearms Center Inc.,* 516 F.Supp. 1281, 1285-86 (E.D.Pa. 1981) (mem. op.) (sales agreement was between defendant and U.S. corporation; defendant agreed that U.S. corporation would be its representative in U.S.; and agreement called for substantial sales in U.S. within first year of contract); *Behring Int'l, Inc. v. Imperial Iranian Air Force,* 475 F.Supp. 383, 390 (D.N.J.1979) (contract was negotiated and executed in New York, where defendant maintained office and picked up contracted-for cargo).

2.

Having concluded that the District Court's three findings do not satisfy the first clause of the section 1605(a)(2) excep-[1110] tion, we look next [25] to the third clause of that section:

> A foreign state shall not be immune . . . in any case . . . in which the action is based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

As noted earlier, the District Court may be read as concluding that its three findings met the standard of this clause. The court did not explain, however, how those activities gave rise to a "direct effect in the United States" within the meaning of the Act.

MINE argued before the District Court that the third clause applies because the contractual breach "had a direct effect on Global." J.A. 248. On appeal, MINE renews and elaborates upon this argument with the following assertions: "In the later stages" of the SOTRAMAR venture, Global "became closely allied with MINE"; Global "was to place many of its ships on line to implement direct carriage of bauxite to the United States"; Global "committed substantial financial resources of its own to the venture" and therefore "stood to realize profits as part of the MINE group of affiliated companies participating in the joint venture with Guinea"; and, finally, Guinea's breach prevented Global from realizing those profits. Appellee's Br. 27-28.

We note at the outset the difficulty of discerning whether these factual allegations were found to be true by the District Court. Before the District Court, MINE did not offer such detailed facts to explain how the breach had a direct effect on Global, *see* J.A. 55, 248, and the "substantial activities" mentioned in the court's findings might well include both the preparation of the report and other SOTRAMAR-related actions.

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[25] *See supra* note 16.

But our difficulty with MINE's argument goes further than the possible absence of necessary findings in support of it. Under our reading of the third clause, even the scenario MINE offers on appeal does not constitute a "direct effect in the United States." This third clause, the House Report stated,

> would embrace commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965).

H.R.Rep. No. 94-1487, *supra,* at 19, U.S. Code Cong. & Admin.News 1976, p. 6618. Section 18, which is entitled "Jurisdiction to Prescribe with Respect to Effect within Territory," Restatement (Second) of Foreign Relations Law of the United States § 18 (1965), concerns the extent to which a state may enact rules of law proscribing conduct outside its territory to prevent the effects of that conduct within its territory. Although section 18 is therefore concerned with legislative rather than judicial action, Congress's clear reference has led some courts to find guidance in section 18's requirement that the effect be "substantial" and "occur[] as a direct and foreseeable result of the conduct outside the territory." [26] *See Ohntrup v. Firearms Center Inc.,* 516 F.Supp. 1281, 1286 (E.D.Pa.1981) (mem. op.); *Chicago Bridge & Iron Co. v. Is-*[1111]*lamic Republic of Iran,* 506 F.Supp. 981, 989

[26] Section 18 reads as follows:

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
>
> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
>
> (b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

(N.D.Ill.1980) (mem. op.); *Verlinden,* 488 F.Supp. at 1298; *Harris v. VAO Intourist,* 481 F.Supp. 1056 (N.D.N.Y.1979) (mem. op.); *see also* Note, Direct Effect Jurisdiction Under the Foreign Sovereign Immunities Act of 1976, 13 N.Y.U.J.Int'l L. & P. 571, 609-10 (1981). *But see Texas Trading,* 647 F.2d at 311 & n. 32; Note, Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause, 55 N.Y.U.L.Rev. 474, 502-05 (1980).

Another factor favoring recourse to section 18 lies in the scope of the FSIA's direct effect clause. The clause differs from the "direct effect" clauses found in many state long-arm statutes, because the former is explicitly intended to encompass effects resulting from commercial as well as tortious activities. *See Texas Trading,* 647 F.2d at 311; *VAO Intourist,* 481 F.Supp. at 1063-64; H.R.Rep. No. 94-1487, *supra,* at 19. The "substantial" and "direct and foreseeable" standards are likewise intended to apply in commercial contexts. *See* Restatement (Second) of Foreign Relations Law of the United States, *supra,* § 18 comment f. In view of Congress's statement, and of the not dissimilar functions of section 18 and the third clause, [27] we consider this source of guidance a proper one.

The direct effect scenario offered by MINE falls short of satisfying these principles; we cannot conclude that the alleged injury to Global was a foreseeable result of any breach by Guinea. To explain this conclusion, it is important to note that the alleged injury to Global is not that Global went unrecompensed for services rendered to SOTRAMAR, but that Global lost anticipated profits. This alleged injury occurred only because Global became involved in the SOTRAMAR undertaking in such a way that it stood to realize some of the profits of that undertaking.

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[27] Although section 18 addresses legislative action, both section 18 and the third clause relate to when an action having an effect within the United States can trigger the exercise of authority by the United States. *See* Restatement (Second) of Foreign Relations Law of the United States, *supra,* § 18 comment b (§ 18 concerns "the question whether the conduct of [an] alien outside the territory had an effect within the territory of a type which justifies the state in prohibiting or regulating this conduct").

Applying the "direct effect" standard to this injury, and without attempting to state generally the circumstances when a commercial activity results in direct and foreseeable consequences, we think that an effect cannot be deemed direct if it occurs solely because of conduct not reasonably contemplated by the commercial activity.[28] Only if involvement such as Global's was reasonably contemplated under the SOTRAMAR undertaking can we view as "direct" the injuries resulting from that involvement.

Neither the SOTRAMAR contract nor any other evidence in the record demonstrates that Global's profit-anticipating involvement was anything but the result of conduct by MINE and Global outside the agreed-upon bounds of the SOTRAMAR endeavor. Although the SOTRAMAR contract appears to have envisioned a broad market,[29] that goal would not, in itself, necessarily entail the substantial involvement of an American company hoping to realize profits from the venture. Neither [**1112**] does the second codicil's reference to "ships supplied by MINE/Global" show that Global could have been anticipated as becoming involved in such a way that it would suffer harm if SOTRAMAR never realized profits.

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[28] Explaining the application of the foreseeability requirement in the commercial context, the comment to section 18 states:

> [T]he rule stated in this Clause does not require intent in the subjective sense, and will usually deal with conduct which was intended to produce the effect within the territory in the sense that those responsible for the conduct had reason to foresee that the effect within the territory would result from the conduct outside.

Restatement (Second) of Foreign Relations Law of the United States, *supra*, § 18 comment f.

[29] Article II of the contract stated in part:

> The COMPANY'S policy shall be to offer at all times and anywhere freight services at competitive international rates. However, for political reasons, [Guinea] reserves the right to exclude certain countries from the traffic of the COMPANY'S ships.

J.A. 209.

IV

Under our reading of the FSIA, the record cannot sustain a finding that Guinea lost its sovereign immunity by virtue of waiver or of commercial activity. Because non-immunity is a condition to subject matter jurisdiction under the FSIA, we reverse the District Court's conclusion that it had subject matter jurisdiction to confirm the arbitration award.

It is so ordered.

No. 82-1754

In the Supreme Court of the United States

OCTOBER TERM, 1982

MARITIME INTERNATIONAL NOMINEES ESTABLISHMENT,
PETITIONER

v.

THE REPUBLIC OF GUINEA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a foreign state is collaterally estopped from challenging the jurisdiction of a district court in a proceeding to enforce an arbitral award where the foreign state did not appear in the proceeding to compel arbitration.

2. Whether, by agreeing to arbitrate a contract dispute under the jurisdiction of the International Centre for the Settlement of Investment Disputes (an international organization seated in the United States), a foreign state implicitly waives its immunity from suit within the meaning of the Foreign Sovereign Immunities Act of 1976 for the purpose of compelling an alternative form of arbitration.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-49a) is reported at 693 F.2d 1094. The opinion of the district court (Pet. App. 1a-6a) is reported at 505 F. Supp. 141.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 1982. A timely petition for rehearing was denied on January 27, 1983 (Pet. App. 44a-48a). The petition for a writ of certiorari was filed on April 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1971 the Republic of Guinea embarked upon a joint venture with petitioner Maritime International Nominees Establishment ("MINE") to establish a company known as SOTRAMAR for the purpose of transporting Guinean bauxite to the West (C.A. App. 126-128, 207-227).[1] The contract between the parties provided that the agreement

[1] "C.A. App." refers to the appendix filed in the court of appeals.

would be governed by Guinean law and that any disputes would be resolved before a panel of arbitrators selected by the President of the International Centre for the Settlement of Investment Disputes ("ICSID") at the joint request of the parties (C.A. App. 222, 226).[2] A codicil stated that the arbitrators would be "selected by the President of the International Court of Settlement of International [*sic*] Disputes in Washington (CIRDI)" [3] (C.A. App. 229). SOTRAMAR never became a functioning commercial entity and disagreements developed between the parties over the terms of the contract (C.A. App. 126-128).

In early 1975, the parties executed a formal joint consent to submit their contract disagreements to ICSID for arbitration (C.A. App. 45). Thereafter, petitioner unilaterally determined that this consent agreement was deficient and purportedly requested Guinea to execute a new instrument (C.A. App. 8-9). Although the facts regarding Guinea's response are disputed,[4] no new agreement was executed and petitioner never formally sought a jurisdictional ruling from ICSID as to whether it would arbitrate the matter if requested to do so (C.A. App. 133, 235-236).[5]

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[2]ICSID is an international body created to facilitate arbitration of investment disputes. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090 ("ICSID Convention").

[3]"CIRDI" is the French acronym equivalent of "ICSID".

[4]Petitioner asserts (Pet. 5) that Guinea "broke off all further communications," while Guinea claims (Br. in Opp. 2) that it never received any request to execute a revised consent form.

[5]Petitioner asserts that "its Lichtenstein nationality [makes] it ineligible to use ICSID's dispute resolving machinery since Lichtenstein is not a party to the ICSID Convention" (Pet. 5). The parties stipulated, however, that for the purpose of the arbitration proceeding, petitioner was to be treated as a Swiss corporation (C.A. App. 45), and Switzerland is a party to the ICSID Convention.

In January 1978 petitioner filed a petition in the United States District Court for the District of Columbia seeking to compel arbitration through the American Arbitration Association ("AAA"), alleging jurisdiction under the Federal Arbitration Act, 9 U.S.C. 4, and the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. 1330, 1602-1611 (C.A. App. 6). In its pleadings, petitioner alleged that the ICSID arbitration agreed to by the parties was not available because of technical deficiencies in the executed joint submission (C.A. App. 9). Although Guinea apparently received due notice of the petition (C.A. App. 16, 4, 7), it did not appear to contest the district court proceedings. The court accepted petitioner's assertions regarding the unavailability of an ICSID arbitration and entered an order compelling arbitration before the AAA (C.A. App. 48).[6]

The AAA thereafter proceeded to arbitrate the dispute on an *ex parte* basis (C.A. App. 53), although Guinea was allegedly kept apprised of the proceedings (C.A. App. 102, 110-124).[7] On June 9, 1980, the arbitrators awarded petitioner more than $25 million (C.A. App. 86-91). Petitioner then returned to the district court to seek confirmation of the award (C.A. App. 51). Guinea appeared by counsel, challenged the personal and subject matter jurisdiction of the court, and moved to dismiss the petition as barred by the FSIA (C.A. App. 125). Petitioner responded, in the alternative, that Guinea had either waived its claim of sovereign immunity by choosing "a foreign forum for arbitration"

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[6]The district court made no jurisdictional findings at this time other than to note that the petition was filed pursuant to the Federal Arbitration Act, 9 U.S.C. 4, and had been duly served on Guinea in accordance with the FSIA (C.A. App. 48).

[7]Whether Guinea had actual knowledge of the arbitration proceeding is disputed. Guinea asserts (Br. in Opp. 3 n.2) that it received no notice of the arbitration proceeding and in fact learned of the subsequent judicial enforcement action "purely by chance" (*ibid.*).

(C.A. App. 243) or was barred from raising a sovereign immunity claim because it "carried on extensive commercial activity in the United States in connection with the Contract" (C.A. App. 247, 260-262). The district court rejected Guinea's jurisdictional challenge, confirmed the arbitral award and entered judgment in favor of petitioner (C.A. App. 297). The court reasoned that "by agreeing to arbitration that could be expected to be held in the United States, Guinea waived its immunity * * * within the meaning of [the FSIA]" (C.A. App. 303).[8]

On appeal, Guinea renewed its challenge to the subject matter and personal jurisdiction of the district court and questioned for the first time the constitutionality of the jurisdictional grant of the Foreign Sovereign Immunities Act of 1976 if applied to suits brought by aliens. See *Verlinden B.V.* v. *Central Bank of Nigeria*, No. 81-920 (May 23, 1983). The United States intervened in defense of the constitutionality of the Act, and also submitted a suggestion of interest with respect to whether consent by a foreign sovereign to arbitrate a dispute before ICSID waives the sovereign's immunity to suit in United States courts.

The court of appeals reversed (Pet. App. 7a-43a). Without reaching the constitutional issue subsequently decided by this Court in *Verlinden*, the court of appeals concluded that Guinea was entitled to immunity under the FSIA. The court found that Guinea had not implicitly waived its immunity by agreeing to submit disputes to an ICSID

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[8]The district court also found (C.A. App. 303-304) that, as a result of certain meetings held to promote SOTRAMAR, Guinea had lost its sovereign immunity by engaging in "commercial activities within the United States" and "commercial activities outside the United States that have a 'direct effect' within this country." 28 U.S.C. 1605(a)(2). These findings were set aside by the court of appeals (Pet. App. 26a-43a) and are not in issue here.

arbitration (28 U.S.C. 1605(a)(1)) (Pet. App. 17a-25a), nor had Guinea engaged in the kind of "commercial activity" that would cause it to forfeit its right to immunity within the meaning of the Act (28 U.S.C. 1605(a)(2)) (Pet. App. 25a-43a).

On petition for rehearing, petitioner argued for the first time that Guinea was collaterally estopped from attacking the district court's subject matter jurisdiction because Guinea had failed to challenge that jurisdiction in the proceeding to compel arbitration (Pet. 10). The court of appeals denied rehearing, noting that since Guinea's challenge constituted an attack on the personal as well as the subject matter jurisdiction of the district court, under the rule reaffirmed in *Insurance Corp. of Ireland* v. *Compagnie des Bauxites*, 456 U.S. 694 (1982), Guinea was free to ignore the initial proceedings, risk a default judgment, and challenge that judgment on jurisdictional grounds in a subsequent collateral proceeding (Pet. App. 49a).

ARGUMENT

1. Petitioner's contention that the court of appeals erroneously disregarded the doctrine of collateral estoppel (Pet. 11-15) does not merit review by this Court. The court of appeals' decision is correct and is not in conflict with the decisions of this or any other federal court.

In the first place, petitioner errs when it states that the court of appeals held "that the order to compel arbitration * * * was *res judicata* between the parties," thus implying "that the district court had the requisite subject matter and personal jurisdiction to issue that order" (Pet. 12). In fact, the court of appeals merely noted that while Guinea had directed some of its jurisdictional arguments both to the motion to compel arbitration and the motion to confirm the ensuing award, the only order subject to review was the order confirming the arbitral award, because the order to

compel arose out of a separate proceeding (Pet. App. 15a n.8).[9] The court went on to observe that petitioner "has not argued that the District Court's finding that it had jurisdiction under the FSIA in the earlier * * * proceeding to compel bars Guinea from questioning the District Court's exercise of jurisdiction in the * * * proceeding to confirm now under review" (Pet. App. 16a n.9). The court nonetheless considered *sua sponte* whether the doctrine of collateral estoppel would bar Guinea from contesting the district court's jurisdiction in the second proceeding.[10] Collateral estoppel did not apply, the court reasoned, because "[t]hat doctrine requires that even issues less basic than jurisdiction be fully litigated before they are preclusively established" (*ibid.*). Since Guinea had not appeared in the first proceeding, the court concluded that the jurisdictional issue had not been litigated in the suit to compel arbitration and was properly raised on appeal from the order confirming the arbitral award (*ibid.*).

The decision of the court of appeals is plainly correct, and petitioner's reliance (Pet. 10, 13) on this Court's recent decision in *Insurance Corp. of Ireland* v. *Compagnie des Bauxites, supra*, is misplaced. Rather than assisting petitioner's cause, that decision is actually fatal to petitioner's collateral estoppel argument, because the Court reaffirmed the well-established rule that "[a] defendant is always free to ignore * * * judicial proceedings, risk a default judgment,

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[9]Petitioner apparently does not object to the court of appeals' determination that the second proceeding was independent of the first proceeding, although it had argued to the contrary in the district court (C.A. App. 254).

[10]The court of appeals noted correctly that because the prior motion to compel adjudicated a different claim than the motion to confirm, any preclusive effect would derive from the doctrine of collateral estoppel, not *res judicata* (Pet. App. 16a, 48a). See *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598 (1948).

and then challenge that judgment on jurisdictional grounds in a collateral proceeding" (456 U.S. at 706). Petitioner asserts that this rule applies only to personal, not subject matter, jurisdiction and contends that lack of subject matter jurisdiction "was the sole basis for the Court of Appeals' reversal of the order to confirm the award" (Pet. 13). But the Court in *Compagnie des Bauxites* restated the familiar rule that "principles of estoppel do not apply" to issues of subject matter jurisdiction because "no action of the parties can confer subject-matter jurisdiction upon a federal court" (456 U.S. at 702). Moreover, even assuming that the rule expressed in *Compagnie des Bauxites* could properly be limited to questions of personal jurisdiction, the decision of the court of appeals is still correct because under the FSIA's "interlocking provisions governing the separate issues of subject matter jurisdiction, sovereign immunity, and personal jurisdiction" (Pet. App. 17a), a lack of subject matter jurisdiction "also deprives the court of personal jurisdiction" (*id.* at 18a).[11] See *Verlinden B.V.* v. *Central Bank of Nigeria, supra*, slip op. 8 n.14.

Petitioner is also incorrect in asserting that footnote nine of the *Compagnie des Bauxites* opinion "leave[s] no doubt that subject matter jurisdiction may not be collaterally attacked so long as the party has had the opportunity to litigate that issue" (Pet. 13). Although a "party that has had an opportunity to litigate the question of subject-matter

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[11]Under 28 U.S.C. 1330(b), "[p]ersonal jurisdiction over a foreign state * * * exist[s] as to every claim for relief over which the district courts have jurisdiction under [28 U.S.C. 1330(a)] where service has been made under section 1608." Under 28 U.S.C. 1330(a), courts have jurisdiction only as to claims "with respect to which the foreign state is not entitled to immunity." Thus, both personal and subject matter jurisdiction must exist before suit may be brought against a foreign state under the FSIA.

jurisdiction may not * * * reopen that question in a collateral attack upon an adverse judgment" (*Insurance Corp. of Ireland* v. *Compagnie des Bauxites, supra*, 456 U.S. at 702 n.9), Guinea has not, in fact, had a prior "opportunity" to litigate the jurisdictional question presented here because it did not appear in the earlier proceeding to compel arbitration. See *Baldwin* v. *Traveling Men's Association*, 283 U.S. 522, 525 (1931) ("If, in the absence of appearance, the court had proceeded to judgment and the present suit had been brought thereon, respondent could have raised and tried out the issue [of lack of jurisdiction] in the present action, because it would never have had its day in court with respect to jurisdiction").[12] Furthermore, a principal case

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[12]The Foreign Sovereign Immunities Act of 1976, together with the fact that Guinea has not, prior to this litigation, had its "day in court" on its claim to sovereign immunity, defeat petitioner's invocation of collateral estoppel. Under the FSIA, the district court's jurisdiction is dependent upon a finding that "the foreign state is not entitled to immunity" (28 U.S.C. 1330(a)). Foreign states, however, are "immune from the jurisdiction of the courts of the United States and of the States" unless an exception is found in the FSIA or applicable international agreements (28 U.S.C. 1604). Statutory exceptions exist when immunity has been waived (28 U.S.C. 1605(a)(1)) or the claim arises from specified commercial activities of the foreign state (28 U.S.C. 1605(a)(2)). The Act further provides that "[n]o judgment by default shall be entered by a court of the United States or of a State against a foreign state * * * unless the claimant establishes his claim or right to relief by evidence satisfactory to the court" (28 U.S.C. 1608(e)). Accordingly, even if a foreign state does not appear to assert its immunity defense, the district court still must verify that immunity is unavailable and that the criteria prescribed by Congress have been satisfied. See, *e.g. International Association of Machinists* v. *OPEC*, 649 F.2d 1354, 1356-1358 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982); *Ipitrade International, S.A.* v. *Federal Republic of Nigeria*, 465 F. Supp. 824, 827 (D. D.C. 1978). See also *Verlinden B.V.* v. *Central Bank of Nigeria, supra*, slip op. 8. No such findings were made by the district court in the proceeding to compel arbitration. Indeed, those findings were not made until Guinea raised its sovereign immunity defense in the proceeding to confirm the arbitral award. Because, under the express terms of the FSIA, the district court lacked jurisdiction over the earlier proceeding to compel arbitration, the court of appeals correctly refused to hold that Guinea was estopped from litigating the sovereign immunity issue in the subsequent confirmation proceeding.

cited in footnote nine of *Compagnie des Bauxites—Chicot County Drainage District* v. *Bank*, 308 U.S. 371 (1940)—has been held to be inapposite where sovereign immunity is at issue. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940).[13] See also *Durfee* v. *Duke*, 375 U.S. 106, 114 (1963). There is, therefore, no reason to conclude that Guinea's failure to assert sovereign immunity in the proceeding to compel arbitration precludes it from raising the defense in a subsequent confirmation action.[14]

2. The court of appeals' decision that the ICSID arbitration agreement did not "foresee * * * a role for the United States courts" (Pet. App. 25a) in the circumstances of this case is correct and does not "undermine[ ] the strong

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[13]In *United States Fidelity & Guaranty Co.*, the Court noted that the principles announced in *Chicot County* may not apply to cases involving sovereign immunity. In *Chicot County*, the Court (309 U.S. at 514-515; footnotes omitted; emphasis added):

> explicitly limited [its] examination to the effect of a subsequent invalidation of the applicable jurisdictional statute upon an existing judgment in bankruptcy. To this extent the case definitely extended the area of adjudications that may not be the subject of collateral attack. No examination was made of the susceptibility to such objection of numerous groups of judgments concerning status, extra-territorial action of courts, or strictly jurisdictional and quasi-jurisdictional facts. *No solution was attempted of the legal results of a collision between the desirable principle that rights may be adequately vindicated through a single trial of an issue and the sovereign right of immunity from suit.*

[14]In any event, the policy underlying the related doctrines of res judicata and collateral estoppel is not self-executing; the defenses must be properly pleaded or otherwise called to the court's attention. See 1B J. Moore & T. Currier, *Moore's Federal Practice* para. 0.405[1], at 629 (2d ed. 1982). Here, petitioner did not assert either doctrine prior to filing the petition for rehearing in the court of appeals (Pet. App. 16a-17a n.9; Pet. 10). The salutary policy of the doctrines, which is to put an end to litigation at some reasonable time after there has been an opportunity to litigate the relevant issues, cannot be realized if they are not timely invoked. See *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598 (1948); *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979).

national policy favoring the arbitrability of transnational commercial disputes" (Pet. 19). In the first place, petitioner fails to acknowledge the narrow scope of the court of appeals' ruling, which the court carefully limited to this particular ICSID arbitration agreement (Pet. App. 25a). More importantly, however, the court of appeals' analysis of ICSID arbitration procedures is correct, and the decision promotes rather than hampers the national policy favoring arbitration of international commercial disputes.

a. The court of appeals carefully analyzed the ICSID Convention to determine whether the agreement between petitioner and Guinea to submit their dispute to arbitration before ICSID constituted an implicit waiver of sovereign immunity under the terms of the FSIA, 28 U.S.C. 1605(a)(1). See H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 18 (1976).[15] The court concluded (Pet. App. 23a), *inter alia*, (1) that the primary motivation for the ICSID Convention was the recognition that international methods of dispute settlement should be available in addition to national processes (ICSID Convention, Preamble); (2) that consent of the parties to arbitration under the ICSID Convention is exclusive of any other remedy (art. 26); and (3) that ICSID processes are self-executing in that once a proper request is submitted to ICSID an arbitral tribunal is immediately constituted, the tribunal decides the issues of its own jurisdiction, and awards rendered by the tribunal are certified as binding and enforceable (arts. 36, 41, 49, 53).

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[15]H.R. Rep. No. 94-1487, 94th Cong. 2d Sess. 18 (1976), states that courts have found implicit waivers of sovereign immunity "where a foreign state has agreed to arbitration in another country * * *." The district court held that Guinea had implicitly agreed to arbitration in the United States by agreeing to ICSID arbitration because ICSID is located in Washington, D.C. (Pet. App. 5a).

The court of appeals nonetheless declined to rule broadly, as the government had suggested, that ICSID agreements generally "do not contemplate the involvement of domestic courts, at least not before a final ICSID decision is to be enforced" (Pet. App. 23a-24a; footnote omitted). Instead, the court concluded that it was unnecessary to reach that broad question because petitioner "ha[d] insisted, and [was] estopped from denying, that United States courts were powerless to compel an ICSID arbitration under this particular arbitration agreement" (*id.* at 24a). Because the "key reason" why an agreement to arbitrate in the United States can be viewed as an implicit waiver of sovereign immunity is "that such agreements could only be effective if deemed to contemplate a role for United States courts in compelling arbitration that stalled along the way," the court had no difficulty in concluding that "this particular ICSID agreement was not an agreement 'to arbitrat[e] in another country' that waives sovereign immunity under the FSIA" (*id.* at 24a-25a). In these circumstances, there is no merit to petitioner's contention (Pet. 15-17) that this holding, limited as it is to the facts of this case, will frustrate future international arbitration agreements by making them legally unrealizable.

b. In any event, petitioner has not demonstrated that there is a need for United States courts to intervene in the enforcement of ICSID arbitration agreements prior to the entry of an arbitral award, and we do not believe that any such need exists. ICSID arbitration agreements are not only self-executing in the ways noted by the court of appeals (Pet. App. 23a), but in other ways as well. For example, once mutual consent to ICSID's jurisdiction has been given, either of the parties may invoke the ICSID process and proceed to arbitration, even in the face of opposition or refusal to participate by the other party (ICSID Convention, *supra*, arts. 39 and 45). A resulting default award has

the same binding status as one reached through a joint proceeding (arts. 45 and 54). Thereafter, mandatory enforcement of ICSID awards is available in United States courts, in accordance with the ICSID Convention as implemented by the Convention on the Settlement of Investment Disputes Act of 1966, 22 U.S.C. 1650-1650a.[16] Thus, the enforcement of valid ICSID arbitral agreements is assured by procedures established by the ICSID Convention, ICSID rules, and special implementing legislation.[17] Accordingly, in our view, an agreement to an ICSID arbitration—without more—cannot be taken as indicative of an intent to waive sovereign immunity and submit to United States judicial processes for compelling an alternative, domestic arbitration because the ICSID process is a distinct international method of dispute resolution, with domestic courts playing only a limited role in the enforcement of ICSID awards.

Were our courts to find an implied waiver of immunity on the basis of consent, or attempted consent, to ICSID jurisdiction—as did the district court below—serious damage would result to the ICSID dispute resolution process. If the contracting states to the ICSID Convention faced the prospect of having their reference of a dispute to ICSID interpreted as a submission to United States domestic jurisdiction, many states might forego the ICSID process in the

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[16]The enforcement of ICSID awards is thus on an entirely separate footing from awards within the framework of either the Federal Arbitration Act, 9 U.S.C. 1-14, or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997; 9 U.S.C. 201-208.

[17]It is impossible to say whether the agreement between petitioner and Guinea would have been enforceable through these procedures because it was never formally submitted to ICSID, and ICSID is the judge of its own jurisdiction (ICSID Convention, *supra*, art. 36).

future. This result would jeopardize the effectiveness of ICSID as a means of dispute settlement for American investors, and ultimately could jeopardize the ability of American citizens to secure investment opportunities abroad. For this reason, the court of appeals' decision furthers rather than hinders the national policy of this country with respect to the arbitration of investment disputes.[18]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[18]The court of appeals did not address, nor do we, the question of whether and to what extent an ICSID arbitration agreement may constitute a waiver of immunity for purposes of judicial enforcement and execution of an ICSID arbitral award.

No. 82-1754

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

IN THE MATTER OF THE
ARBITRATION BETWEEN MARITIME
INTERNATIONAL NOMINEES ESTABLISHMENT,
Petitioner,

v.

THE REPUBLIC OF GUINEA,
Respondents,

UNITED STATES OF AMERICA,
Intervenor.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner respectfully submits this reply to the briefs in opposition filed by the Republic of Guinea and by the United States.

ARGUMENT

1. In opposing the petition for certiorari, the United States and Guinea take positions which run directly counter to this Court's tendency to limit litigation by expanding the scope of collateral estoppel and *res judicata*. *See, e.g.*, Note, *Res Judicata/Collateral Estoppel Effect of a Court Determination in a Subsequent Action*, 45 Alb. L. Rev. 1029 (1981); Comment, *The Expanding Scope of the Res Judicata Bar*, 54 Tex. L. Rev. 527 (1976). Both opposing

parties take the narrowest possible view of the estoppel effect of default judgments.

Only last Term, this Court unequivocally reiterated the long standing rule that a defaulting party that has had the opportunity to challenge subject matter jurisdiction is estopped from relitigating that issue in another proceeding between the same parties. *Insurance Corp. v. Compagnie des Bauxites,* 456 U.S. 694, 700 n. 8 (1982). Guinea and the United States argue that *Compagnie des Bauxites* is inapposite since it only applies where both actions are based on the same claim. According to the respondents, if the second proceeding is based on a "different claim," all issues decided in the prior default proceeding, including subject matter jurisdiction, are subject to collateral attack. (Guinea Br. 7; United States Br. 6). They argue further that an action to confirm an arbitral award constitutes a "different claim" from that asserted in the prior proceeding to compel arbitration. (Guinea Br. 7; United States Br. 5-6).

Actions to compel arbitration and to confirm an arbitral award are *not* two "different claims." They are merely two procedural steps in the assertion of a single underlying cause of action. *Marchant* v. *Mead-Morrison Co.,* 29 F.2d 40, 43 (2d Cir. 1928)[1]; *Krauss Bros. Lumber Co.* v. *Louis Bossert & Sons, Inc.,* 62 F.2d 1004, 1005 (2d Cir. 1933). Accordingly, in *Marine Transit Corporation* v. *Dreyfus,*

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[1]Although the *Marchant* case dealt with the New York Arbitration Act, given the similarity between the New York and Federal Acts, New York cases are deemed authoritative in the absence of applicable Federal cases. *Amicizia Societa Navegazione* v. *Chilean Nitrate and Iodine Sales Corp.,* 184 F.Supp. 116, 117 (S.D.N.Y. 1959).

294 U.S. 263, 275-76 (1932), this Court stated that "where the court has authority under the [Federal Arbitration Act] . . . to make an order for arbitration, the court also has authority to confirm the award."

A proceeding to confirm an aribtral award is thus analogous to a proceeding to register a judgment in a different jurisdiction. In the latter case, the judgment debtor cannot relitigate issues that were litigated, or could have been litigated – including subject matter jurisdiction – in the prior proceeding. *See, e.g., Hatridge* v. *Aetna Casualty Surety Co.*, 415 F.2d 809 (8th Cir. 1969); *Indemnity Ins. Co. of North America* v. *Smoot*, 152 F.2d 667 (D.C. Cir. 1945); *Restatement (Second) of Judgments* § 18 (1982).

2. Even assuming, *arguendo*, that "different claims" were asserted in the two connected proceedings, it does not follow, as Guinea and the United States contend, that a default judgment never has collateral estoppel effect.[2] Unfortunately, guidance from this Court on this issue is scant

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[2]Even if collateral estoppel did not generally apply to issues pertaining to the subject matter of a default judgment, which we deny, it should be made applicable to the present case. Unlike the issues involved in every prior federal decision on this point, this case involves a determination of subject matter jurisdiction, which must always be determined by a federal court. Section 1608(e) of the FSIA requires that before a default judgment is rendered against a foreign sovereign, the claimant must establish a claim or right to relief "by evidence satisfactory to the court." Since subject matter jurisdiction is a crucial component of any claim, a court that issues a default judgment against a sovereign necessarily must have determined that it had subject matter jurisdiction to render that judgment. In this case, subject matter jurisdiction was pleaded by MINE and the district court found that MINE had established a claim for relief pursuant to that statute.

and somewhat contradictory;[3] federal circuit courts' decisions are in conflict,[4] as are the writings of legal

[3]In *Last Chance Mining Co.* v. *Taylor Mining Co.*, 157 U.S. 683, 691 (1895), the Court ruled that "a judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest." The Court has suggested at least two, or possibly three, different standards for determining the collateral estoppel effect of a judgment with respect to a second proceeding placed on a different claim. According to the most recent decision, *Nevada* v. *United States*, 51 U.S.L.W 4974, 4979 n. 11 (June 24, 1983), collateral estoppel can be used only to prevent "relitigation of issues actually litigated" in a prior lawsuit. Two years earlier, however, in *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980), this Court had suggested a different test: "Under collateral estoppel, once a court has *decided* an issue of fact or law necessary to achieve a judgment, that decision may preclude litigation of the issue in a suit on a different cause of action . . . " . (Emphasis added.) A similar test was employed in *Montana* v. *United States*, 440 U.S. 149, 153 (1979). Yet a month earlier, in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n. 5 (1979), the Court seemingly relied on the "actually litigated" test.

Clearly, the outcome of a particular case will vary depending on which test is used. A plaintiff is always required to state the basis for the court's subject mater jurisdiction in his pleadings, and the court must necessarily rule on the issue before proceeding to judgment — even a default judgment. Thus, the findings required in a default judgment rendered by a federal court would seem to satisfy a "necessarily determined" or "necessarily decided" criterion, but presumably fail to satisfy a "necessarily litigated" standard.

[4]The First Circuit held in *United States* v. *DeVincent*, 632 F.2d 147, 154 (1980) that "collateral estoppel only bars relitigation of an issue of ultimate fact which was actually *or* necessarily determined by the former judgment . . ." . (Emphasis added). Also favoring the use of collateral estoppel in the case of "necessarily determined" issues that were not litigated are the Fifth, Eighth and D.C. Circuits, and the Court of Customs and Patent Appeals. *Peckham* v. *Family Loan Co.*, 196 F.2d 838 (5th Cir. 1952); *Brown* v. *Kenron Alum. & Glass Corp.* 477 F.2d 526 (8th Cir. 1973); *Woods* v. *Cannaday*, 158 F.2d 184 (D.C. Cir. 1946); and *Williams* v. *Five Platters*, 510 F.2d 963 (C.C.P.A. 1975).

Circuits which have reached contrary decisions include the D.C. Circuit and the 3d Circuit: *Konstantinidis* v. *Chen*, 626 F.2d 933 (D.C.

scholars.[5] Those cases which tend to limit the application of collateral estoppel to issues that were actually litigated generally involve situations in which relitigation of those issues does not undermine the integrity and value of the judgment itself,[6] as would happen in the present case. Here, if the court of appeals' decision to open the issue of subject matter jurisdiction to collateral attack is left intact, the order to compel arbitration and the subsequent arbitral award become valueless in a federal court.

3. In general, whenever Congress confers new subject matter jurisdiction on federal courts, the requirements for subject matter and personal jurisdiction are entirely independent of each other. However, under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), and only under that Act, subject matter and personal jurisdiction are comingled. The elimination of traditional distinctions between subject matter and personal jurisdiction blurs the general principles of *res judicata* and collateral estoppel as they apply to each kind of jurisdictional issue. If subject matter jurisdiction cannot be collaterally attacked where one

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Cir. 1980), *Tutt* v. *Doby*, 459 F.2d 1195 (D.C. Cir. 1972) and *Matter of McMillan*, 579 F.2d 289 (3d Cir. 1978).

[5] *Compare, e.g.*, 1B Moore, *Moore's Federal Practice* ¶0.444[2] (2d ed. 1983), Restatement (Second) of Judgments § 27 (1982), and Hazard, *Revisiting the Second Restatement*, 66 Cornell L.Rev. 564, 574-586 (1981) *with* 2 Freeman, *A Treatise on the Law of Judgments* § 662 (5th ed. 1925) and Vestal, *The Restatement (Second) of Judgments, Modest Dissent*, 66 Cornell L.Rev. 464, 483-488 (1981).

[6] *See, e.g.*, *Tutt* v. *Doby*, *supra*, 459 F.2d 1195 (permitting relitigation of issue of *amount* of rent due where prior action was concerned largely with whether or not landlord was entitled to possession of premises for nonpayment of rent); *Konstantinidis* v. *Chen*, *supra*, 626 F.2d 933 (permitting plaintiff, who had received workers' compensation settlement for damages allegedly arising from work-related accident, to sue his doctor for essentially the same damages on claim of negligent acupuncture treatment.)

has had an opportunity to litigate the issue, but personal jurisdiction can be collaterally attacked under some circumstances, as the court of appeals suggests, what happens when the same facts and legal conclusions apply to both forms of jurisdiction under the FSIA? We suggest that this issue alone requires review and clarification by this Court.

4. Guinea and the United States also question MINE's right to petition this Court for review of the court of appeals' ruling on collateral estoppel because MINE allegedly did not raise this issue in a timely fashion below.[7] Whether or not this is so, the court of appeals itself raised and ruled upon the issue of collateral estoppel in its original opinion, and reaffirmed its ruling in its revised opinion. These rulings are holdings of the court – not dicta. They will serve as precedent in this important, but unchartered, area of federal law unless this Court decides otherwise.

It cannot be seriously contended that if this Court disagrees with the court of appeals' interpretation of the federal doctrine of collateral estoppel, it may not correct it. Yet this is precisely what Guinea and the United States suggest. Neither the United States nor Guinea cite any authority supporting their contention that this Court may never review an issue raised *sua sponte* by a lower court. Although this court is of course not required to review such an issue, it certainly can if it so wishes. *See, e.g., Blair* v. *Oesterstein Machine Co.*, 275 U.S. 221, 225 (1927);

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[7]Petitioner has always contended that it did in effect raise this issue in a timely fashion prior to its petition for rehearing in the court of appeals. In its opening brief in the court of appeals dated November 2, 1981, at 20-22, MINE argued that the district court's order to compel arbitration was *res judicata* and could not be collaterally estopped. Guinea thus had ample opportunity to address the issue of collateral estoppel below.

Illinois v. Gates, No. 81-430, *slip op.* at 2-9 (June 8, 1983); *see also, Verlinden B.V. v. Central Bank of Nigeria*, No. 81-920, *slip op.* at 4-5 (May 23, 1983).

CONCLUSION

This case – a case which already has been the subject of considerable scholarly writings –[8] raises several important, difficult, and recurring issues of federal jurisdiction and the federal doctrine of *res judicata* and collateral estoppel. One of these issues – the effect of the merger of personal and subject matter jurisdiction in the FSIA – is one of first impression. One other – the collateral estoppel effect of an issue decided in a default judgment case – is the subject of conflicting statements by this Court, holdings by the circuit courts and opinions of legal scholars. These issues, we submit, require review and

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[8] *See, e.g.*, Comment, *Effect on U.S. Jurisdiction of Agreement by a Foreign Sovereign to Arbitrate before the International Center for the Settlement of Investment Disputes, Maritime International Nominees Establishment v. Republic of Guinea*, 16 Geo. Wash. U.J. Int'l L. & Econ. 451 (1982); Comment, *Sovereign Immunity – arbitration – agreement to arbitrate not contemplating role for U.S. courts held not to waive immunity, Maritime International Nominees Establishment v. Republic of Guinea*, 77 Am. J. Int'l L. 318 (1983); Dellapenna, *Suing Foreign Governments and Their Corporations; Choice of Law, Part VII*, 87 Com. L.J. 244 (1982); Kahale, *Arbitration and Choice of Law Clauses as Waivers of Jurisdictional Immunity*, 14 N.Y.J. Int'l L. & Pol. 29 (1981); Comment, *Problems "Arising Under" Verlinden, B.V. v. Central Bank of Nigeria*, 31 Am. U.L. Rev. 1039 (1982); Note, *Subject Matter Jurisdiction and the Foreign Sovereign Immunities Act of 1976*, 68 Va. L. Rev. 893 (1982).

clarification by this Court. For these reasons, the writ of certiorari should be granted.

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